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Richard H.W. Maloy

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The Odyssey of a Supreme Court Decision About the Sanctity of Opinions Under the First Amendment

Cover Page Footnote

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THE ODYSSEY OF A SUPREME COURT DECISION ABOUT THE SANCTITY OF OPINIONS UNDER THE FIRST AMENDMENT

*Richard H.W. Maloy*¹

Introduction

I practiced law for 33 years. During that time I was a Visiting Professor of Law and wrote 25 law books. For the past 10 years I have been teaching law full time. I thought I knew the law fairly well. I always thought that when the United States Supreme Court rendered a decision, it was followed. Not until I stumbled onto *Milkovich v. Lorain Journal Co.*² and its progeny did I realize that such is not what always occurs. In *Milkovich*, the United States Supreme Court said that just because the media³ labels its assertions as “opinion” when it criticizes a private figure⁴ even in a

¹ Richard H.W. Maloy is an Associate Professor of Law at St. Thomas University of Law in Miami, Florida. He earned a J.D. from Columbia University and a LL.M. from the University of Miami. The author wishes to acknowledge the work of Stephen Tourtelot, who put in untold hours on this piece.

² 497 U.S. 1 (1990).

³ I contemplate that most judges, when they use the term “media” refer to “the means of communication, as radio, television, newspapers and magazines, with wide reach and influence” as that term is defined in *Random House Webster's College Dictionary* 842 (1st ed. 1991). A U.S. District Court in *Seidl v. Greentree Mortgage Co.*, 30 F. Supp. 2d 1292, 1319 (D.Col. 1998), refused to grant any special protection to communications on the Internet.

⁴ The Court has not definitively said just precisely what a “private figure” is; rather, it has resolved cases on the basis of whether a plaintiff is or is not a “public figure.” It has said that a “public figure” is one who has thrust himself/herself “to the forefront of particular public controversies in order to influence the resolution of the issues involved . . . they invite attention and comment.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974). One who has achieved “general fame or notoriety in the community, and pervasive involvement in the affairs of society” is a public figure. *Id.* at 351-52. The Court said in *Gertz* that a

private individual . . . has not accepted public office or assumed an influential role in ordering society . . . He has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Thus private individuals are not only more

matter of public concern,⁵ it does not gain a license to defame that person under the aegis of the First Amendment to the United States Constitution.⁶ The court in *Milkovich* relied on three factors to determine whether a statement was opinion. However, a survey of cases that refer to *Milkovich* shows that some courts are following it, others are misinterpreting it, and others are simply refusing to follow it.⁷

vulnerable to injury than public officials and public figures; they are also more deserving of recovery.

Id. at 345. See *infra* text accompanying note 24. A wealthy divorcee who did not “assume any role of especial prominence in the affairs of society . . . [and] did not thrust herself to the forefront of any particular public controversy” is not a public figure. *Time, Inc. v. Firestone*, 424 U.S. 448, 453 (1976). It has been said that “where the plaintiff has no policy-making authority, where her ‘control . . . over the conduct of government is at most remote and philosophical,’ she will not be held a public official.” *Kahn v. Bower*, 284 Cal. Rptr. 244, 252 (Cal. App. Ct. 1991). A City’s Street and Traffic Control Maintenance Supervisor, who “at the most was involved in operational decisions regarding street maintenance” is not a “public figure.” *LeDoux v. Northwest Publ’g, Inc.*, 521 N.W.2d 59, 66 (Minn. Ct. App. 1994).

⁵ The courts on an *ad hoc* basis are defining “public concern.” A California Court of Appeal has said that the performance of his duties by a public defender and “administration of the criminal laws in general and laws relating to child molestation in particular” are matters of public concern. *James v. San Jose Mercury News, Inc.*, 20 Cal. Rptr. 890, 896 (1993).

⁶ *Milkovich*, 497 U.S. at 18.

⁷ As an example, though *Milkovich* overruled the dictum found in *Gertz* to the effect that the expression of an opinion is not entitled to constitutional protection, a United States District Judge in New Mexico wrote that “[t]he expression of an opinion or an idea is generally protected by the First Amendment to the United States Constitution.” *Schuler v. The McGraw-Hill Cos.*, 989 F. Supp. 1377, 1384 (D. N.M. 1997). The Supreme Court itself, has referred to the decision only once. In *Virginia Bancshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991), a case dealing, *inter alia*, with whether a statement purporting to explain corporate directors’ actions can be materially misleading within Rule 14a-9, Justice Souter, writing for the Court, supporting his conclusion that “not every mixture with the truth will neutralize the deceptive,” in a parenthetical summary of *Milkovich* said “a defamatory assessment of facts can be actionable even if the facts underlying the assessment are accurately presented.” *Id.* at 1097. Justice Stevens dissented in *Spencer v. Kemma*, 523 U.S. 1, 25 (1998), a case that held moot an inmate’s petition challenging a parole procedure. He quoted Justice Rhenquist’s reference in *Milkovich* to Shakespeare’s Othello about robbing one of his good name. *Milkovich*, 497 U.S. at 12.

After a brief history of the case law regarding the First Amendment leading up to *Milkovich*, this paper shows that the progeny can be grouped into eight different categories or types of cases, e.g. non-public figures suing media defendants, public figures suing non-media defendants, and the like, but that such categorization does not reflect any particular pattern of rulings. What is of greater significance to me is the manner in which the progeny have reacted to *Milkovich*. There appears to be nine such types of treatment. Some courts refuse to follow *Milkovich* because they conclude that their state laws offer greater protection for speech than does the First Amendment. Some courts use authorities other than *Milkovich* in deciding the fact/opinion issue. Some courts do not rely on any precedent, but construct their own reasons for differentiating fact from opinion. Some courts use all three *Milkovich* factors,⁸ while others eclectically choose from among the three. A few courts refer to *Milkovich*'s admonition about reviewing the entire record in First Amendment cases though neither the Supreme Court nor the progeny have specifically touched upon the issue of whether "opinion" is an affirmative defense or is an element of defamation. The progeny's rulings have indicated that "opinion" is an affirmative defense. This paper deals with those subjects.⁹

The Supreme Court's Development of Defamation Law

Chief Justice Rehnquist has reminded us that "[s]ince the latter half of the 16th century the common law has afforded a cause of action for damage to a person's reputation by the publication of false and defamatory statements."¹⁰ Initially in this country, the

⁸ See *infra* text accompanying notes 76-79.

⁹ The paper considers the elements of defamation (publication, malice, harm, and the like), only as they may impact upon the subject of inquiry, to wit: opinion, *vel non*. The states (and federal courts sitting within them), are generally considered alphabetically and then chronologically within each state.

¹⁰ *Milkovich*, 497 U.S. at 11. See also L. ELDREDGE, LAW OF DEFAMATION 5 (1978); R. SMOLLA, LAW OF DEFAMATION § 4.05 (1990) (pointing out that it has been found that even concededly accurate information is capable of bearing a defamatory meaning, described as defamation by implication). The District of Columbia Circuit in *White v. Fraternal Order of Police*, 909 F.2d 512 (D.C. Cir. 1990), said:

states fashioned the remedies for redressing damage to one's reputation.¹¹ "Under typical state defamation law the defamed private citizen had to prove only a false publication that would subject him to hatred, contempt or ridicule in order to recover damages for defamation."¹² "For many years, states enacted statutes and applied common law tort principles in the area of defamation with no more than a passing nod to the First Amendment's free speech guaranty,"¹³ but during the last half of the twentieth century the United States Supreme Court began

[I]f a communication, viewed in its entire context, merely conveys materially true [sic] facts from which a defamatory inference can reasonably be drawn, the libel is not established. But if the communication, by the particular manner or language in which the true [sic] facts are conveyed, supplies additional affirmative evidence suggesting that the defendant *intends* or endorses the defamatory inference, the communication will be deemed capable of bearing that meaning.

Id. at 520. The court offered the following test:

The court must first examine what defamatory inferences might reasonably be drawn from a materially true communication, and then evaluate whether the author or broadcaster has done something beyond the mere reporting of true [sic] facts to suggest that the author or broadcaster intends or endorses the inference.

Id. The court pointed out that lack of intent to convey the defamatory meaning is not a defense as long as the defamatory interpretation is a reasonable one. *Id.* at 519. The court declined to rule on whether the omission of material facts is an element of defamation by implication, *id.* at 521, but noted the relevance of juxtaposing a series of facts "so as to imply a defamatory connection between them." *Id.* at 523. It would appear that truth is a complete defense even in defamation by implication cases. The court opined: "[a] defamation by implication . . . is not treated any differently than a direct defamation once the publication has been found capable of a defamatory meaning. A defendant may escape liability if the defamatory meaning is established as true or as constitutionally protected expression." *Id.* It is the implication which may be defamatory if proved false, not the statements of fact upon which that implication is based, for those statements are beyond question.

¹¹ See *Roffman v. Trump*, 754 F. Supp. 411, 414 (E.D. Pa. 1990).

¹² See *Milkovich*, 497 U.S. at 13 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 370 (White, J., dissenting)).

¹³ *Levinsky's Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 126 (1st Cir. 1997).

placing First Amendment limitations on state defamation law as they concerned the persons allegedly defamed.¹⁴

As early as 1942, the Supreme Court began placing limitations on the type of speech which may be the subject of a state defamation action. It ruled that a State is not prohibited by the Fourteenth Amendment, which guarantees First Amendment protection to state residents, from passing a statute which prohibits one from uttering lewd and obscene, profane, insulting or "fighting" words - those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.¹⁵

In the 1964 case *New York Times v. Sullivan*, the Court decided that a "public official"¹⁶ is required to prove "actual malice"¹⁷ in order to recover in a defamation case.¹⁸ The Court announced "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-

¹⁴ As the Court of Appeals of Washington said in *Haueter v. Cowles Publ'g Co.*, 811 P.2d 231, 238 (Wash. Ct. App. 1991), "the First Amendment has shaped the common law of defamation."

¹⁵ *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

¹⁶ In *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964), the "public official" was a city commissioner. In *White*, 909 F.2d at 512, a high ranking police officer conceded that he was a "public official." The rationale used by the court was not that his duties made him such, but that he was an official "charged with enforcing the law" whose fitness had been called into question by being accused with "personal drug use." *Id.* at 517.

¹⁷ The United States Supreme Court has said that "actual malice" is "a term of art denoting deliberate or reckless falsification." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 499 (1991). The finding of malice, *vel non*, is a question of law. *Milkovich*, 497 U.S. at 17. It has been opined that it does not equate with ill-will. *Russell v. A.B.C.*, No. 94 C 5768, 1997 WL 598115, at *5 (N.D. Ill. Sept. 19, 1997). "Actual malice is subjective in nature." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 511 n.30 (1984). Even "an extreme departure from accepted professional standards of journalism will not suffice to establish actual malice." *Newton v. N.B.C.*, 930 F.2d 662, 669 (9th Cir. 1990).

¹⁸ *Sullivan*, 376 U.S. at 279-80 (stating that the court was adopting a "federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' - that is with knowledge that it was false or with reckless disregard of whether it was false or not."). The Court added that "there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." *Id.* at 270.

open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”¹⁹ In 1966 the Court determined that the issue of who was a “public official” was one of federal, not state, law to be determined by the court.²⁰ In the following year, the Court extended the “actual malice” requirement to “public figures.”²¹ Subsequently, the Court made a clarification of the term “actual malice,” saying “[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.”²²

In *Rosenbloom v. Metromedia, Inc.*, a plurality of the court decided that in a “private individual’s” defamation action involving statements of “public concern,” the “actual malice” standard was not appropriate.²³ Subsequently, in 1974 the Court extended the “actual malice” requirement to “private figures” who seek punitive or presumed (i.e. compensatory), damages if the allegedly defamatory words relate to a “matter of public concern,” but that otherwise the states are free to define the standard of liability required of a private plaintiff in an action against a media defendant, provided that standard requires that the plaintiff prove

¹⁹ *Id.*

²⁰ *Rosenblatt v. Baer*, 383 U.S. 75, 84, 88 (1966).

²¹ *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). According to one court, artificial persons can be “public figures.” See *Mattel, Inc. v. MCA Records, Inc.*, 28 F. Supp. 2d 1120, 1162-63 (C.D. Cal. 1998).

²² *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

²³ 403 U.S. 29, 52 (1971) (plurality opinion). In 1990, a U.S. District Judge said “[a]n otherwise private individual who injects himself or herself into a public dispute, thereby attaining a position that is sufficiently ‘public’ to justify the imposition of the actual malice requirement,” but the involvement must be “substantial.” *Roffman*, 754 F. Supp. at 417, 418. See *supra* note 4. This type of plaintiff is called a “limited purpose public figure.” See *Ireland v. Edwards*, 584 N.W.2d 632, 637 (Mich. Ct. App. 1998) (being the mother in a child custody battle which attracted news coverage). See *infra* notes 45 and 98 for other cases involving this type of plaintiff. The Supreme Court of Arizona has held that a lawyer does not become a limited purpose public figure by simply representing a client; *Spence v. Flynt*, 816 P.2d 771 (Wyo. 1991). A Connecticut trial court does not recognize a limited purpose public figure. See *Mozzochi v. Hallas*, No. CV 950556163S, 1998 WL 19910, at *2 n.1 (Conn. Super. Ct. Jan. 6, 1998).

some fault.²⁴ Then in *Dun & Bradstreet v. Greenmoss Builders, Inc.*, a plurality of the Court held that “private” plaintiffs do not have to prove “actual malice” if the allegedly defamatory speech relates to “issues of private concern;” in other words, the Court refused to extend “public speech” protections to purely private speech.²⁵ The Supreme Court has also noted that in order to recover damages the plaintiff must prove actual, though not necessarily pecuniary, harm.²⁶

In addition to the cases that set the stage for analyzing defamation, the Supreme Court decided additional cases further clarifying this area of law. In *Greenbelt Cooperative Publ’g Ass’n, Inc. v. Bresler*, the Court held that a local newspaper had not defamed a real estate developer by stating that some people had described his negotiating position as “blackmail” because virtually no one would conclude that the plaintiff had been accused of some variety of the crime of extortion.²⁷ Then in 1974, the Court held that a labor union newsletter did not defame a letter carrier by including his name in a list of “Scabs,” despite the union’s material defining a “scab” as a “traitor”, since it did not actually accuse him of the crime of treason.²⁸ In the same case the Court held that the

²⁴ *Gertz*, 418 U.S. at 324, 339 (holding that the Sullivan malice standard is inappropriate for a private person attempting to prove that he was defamed on matters of public interest). A private individual may recover compensatory damages by showing that the defendant was merely negligent. *Id.* at 349-50. The Court further declared that the showing of “actual malice” is subject to a *clear and convincing* standard of proof, *id.* at 342, and that the State has an interest in defamation law: “[t]he legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood.” *Id.* at 341.

²⁵ 472 U.S. 749, 758 (1985) (a plurality decision). *See also* *Weissman v. Sri Lanka Curry House, Inc.*, 469 N.W.2d 471, 472 (Minn. Ct. App. 1991).

²⁶ *Gertz*, 418 U.S. at 349-50.

²⁷ 398 U.S. 6, 14 (1970) (stating that “even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the developer’s] negotiating position extremely unreasonable”).

²⁸ *Letter Carriers v. Austin*, 418 U.S. 264 (1974); *see id.* at 284-86 (holding that the words “scab” and “traitor” were used “in a loose, figurative sense,” which was “merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members.”).

question of whether the statement is one of fact or of opinion is one of law.²⁹

In *Michigan v. Long*, the Court held that if a state court decision “indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds” it will not undertake to review the decision.³⁰ In other words, that the case will not be decided on First Amendment grounds. Thereafter, the Court held that a private plaintiff who seeks to recover against a media defendant must prove that the “speech of public concern” is “false.”³¹

Later, in 1984, the Court, in a commercial disparagement case, pronounced that an appellate court must review trial court decisions in defamation cases *de novo*.³² It also established a special case for First Amendment protection, to wit: the “rational interpretation” of an ambiguous source. Where a commentator is describing a subject of some complexity she is given a license to make some errors.³³ In 1986, the Supreme Court held that in order to support a finding of actual malice, a plaintiff must show that the statements were made with knowledge that it was false or with reckless disregard of whether it was false or not.³⁴

In 1988, the Court³⁵ held that the First Amendment precluded recovery by a nationally known evangelist against a

²⁹ *Id.* at 282.

³⁰ 463 U.S. 1032, 1041 (1983).

³¹ *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 769, 777 (1986) (stating that “the common law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern.”). The Court fashioned “a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages.” *Id.* at 775-76. The Court made it clear that it was reserving ruling on non-media defendants. *See id.* at 779 n.4.

³² *Bose Corp.*, 466 U.S. at 499 (stating that “in cases raising First Amendment issues . . . an appellate court has an obligation to ‘make an independent examination of the whole record’ in order to make sure that ‘the judgment does not constitute a forbidden intrusion on the field of free expression’ ”) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964)).

³³ *Id.* at 512.

³⁴ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986).

³⁵ *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988).

magazine ad parody³⁶ which alleged that his first sexual encounter was with his mother in an outhouse while both parties were drunk, because it could not reasonably have been interpreted as stating actual facts about the public figure involved.³⁷ In 1989, the Court ruled that “actual malice,” *vel non*, is a question of law,³⁸ which may be proved by circumstantial evidence.³⁹

Milkovich v. Lorain Journal Co.

In 1990, the Court in *Milkovich v. Lorain Journal Co.*,⁴⁰ continued its structuring of the federal common law of defamation by deciding that, contrary to popular belief,⁴¹ there is no so-called “opinion privilege” wholly in addition to those protections guaranteed by the First Amendment, which are mentioned above.⁴² The Court held that

³⁶ An ad parody is a form of caricature, which in this case contained a disclaimer “not to be taken seriously.” *Id.* at 48.

³⁷ *Id.* at 50.

³⁸ *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 685 (1989) (“The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law.”).

³⁹ *Id.* at 668.

⁴⁰ 497 U.S. 1 (1990).

⁴¹ A dictum in the *Gertz* opinion has been assigned as the reason for belief that there was an “opinion privilege.” See *Milkovich*, 497 U.S. at 18. That dictum was: “[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.” *Gertz*, 418 U.S. at 339-40. Judge Friendly in *Cianci v. New Times Publ'g Co.*, 639 F.2d 54, 61 (2d Cir. 1980), said that this dictum “has become the opening salvo in all arguments for protection from defamation actions on the ground of opinion, even though the case did not remotely concern the question.” At least two federal Circuits, pre-*Milkovich* held that statements of opinion are absolutely protected under the First Amendment. See *Ollman v. Evans*, 750 F.2d 970, 971, 975 (D.C. Cir. 1984); *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1302 (8th Cir. 1986).

⁴² *Milkovich*, 497 U.S. at 21. This case reversed an Ohio Supreme Court decision in *Milkovich v. News-Herald*, 46 Ohio App. 3d 20, 23, 545 N.E.2d 1320 (1989). It has been called the “most important decision in this area of law since *New York Times v. Sullivan* and *Curtis Publishing Co. v. Butts*.” See *Spence v. Flynt*, 816 P.2d 771, 775 (Wyo. 1991) (internal citations omitted). Apparently not all courts recognized the importance of the decision. See, e.g., *Martin v. Widener Univ. School of Law*, 1992 WL 153540, at *15 (Del. Super.

Under the First Amendment, which is applicable unless the State affords greater protection, in order to be actionable, a statement made by the media⁴³ about a private (non-public), figure involving a matter of public concern⁴⁴ must reasonably imply false and defamatory connotations regarding that private figure and that those false connotations were made with some level of fault, “as required by *Gertz*,”⁴⁵

and when the First Amendment is invoked an appellate court must make a *de novo* review.⁴⁶

Ct. 1992) in which it was said about *Milkovich* that “[a] recent United Supreme Court case has cast some doubt on the efficacy of the ‘opinion’ protection afforded by the First Amendment.”

⁴³ The Court reserved judgment on cases involving non-media defendants. See *Milkovich*, 497 U.S. at 20 n.6. See *infra* note 99.

⁴⁴ This has prompted some courts to conclude that “purely private defamation actions” (i.e. an action by a person who is not a “public official” or a “public figure” or a “limited purpose public person” against a non-media defendant), are governed by state defamation law. See *Kovatovich v. K-Mart Corp.*, 88 F. Supp. 2d 975, 990 (D. Minn. 1999). This begs the question: can any defamation action against a media defendant be other than a “matter of public concern”? At least one court has answered this question in the negative, “because any newspaper article arguably is one of public interest and such a test consequently is meaningless.” See *Kumaran v. Brotman*, 617 N.E.2d 191, 202 (Ill. App. Ct. 1993). A United States District Court for the Middle District of Alabama in *Marshall v. Planz*, 13 F. Supp. 2d 1246, 1257 n.27 (M.D. Ala. 1998), said that there can be matters of private concern, in which *Restatement (Second) of Torts* § 566 applies, but it did not say whether such can exist where a media defendant is involved. See also *infra* notes 64, 84.

⁴⁵ *Milkovich*, 497 U.S. at 21, 22. Thus the Court did not state what fault on the part of the media must be proved by a private person who was defamed by it. The Court deferred to *Gertz*, which deferred to the states: “We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.” *Gertz*, 418 U.S. at 347. This, of course begs the question: is there any different rule for a non-private plaintiff?

⁴⁶ *Milkovich*, 497 U.S. at 17 (“[I]n cases raising First Amendment issues . . . an appellate court has an obligation to ‘make an independent examination of the whole record’ in order to make sure that ‘the judgment does not constitute a forbidden intrusion on the field of free expression.’”). This was an acknowledgment of the Court’s prior pronouncements. See *Bose Corp.*, 466 U.S. at 499.

The Court made it clear that henceforth, rather than attempting to discern whether a media defendant in a defamation case was simply expressing its “opinion,”⁴⁷ the courts must focus on whether the defendant falsely accused the plaintiff of some wrongdoing.⁴⁸ The question is not whether the defendant expressed an opinion, but rather whether if what it expressed was “the sort of loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining that” the object of his criticism was guilty of some wrongdoing.⁴⁹ In other words, in a case against the media for allegedly having defamed a person about a matter of public concern, the defendant cannot prevail by asserting that it was merely expressing an “opinion;” it must prove that it was either accurately stating facts, or, at the other end of the spectrum, that it was proclaiming

⁴⁷ Chief Justice Rehnquist wrote: “the statement ‘In my opinion Jones is a liar’ can cause as much damage to reputation as the statement ‘Jones is a liar.’” *Milkovich*, 497 U.S. at 19. As a U.S. District Judge said in *Fuente Cigar, Ltd. v. Opus One*, 985 F. Supp. 1448, 1457 (M.D. Fla. 1997), “to preface damnation with a phrase like ‘in my view,’ or ‘in our opinion,’ does not afford it talismanic immunity.” In 2000, the Florida Supreme Court ruled that a lawyer’s calling a witness a “liar” is not per se ethically or legally improper closing argument. See *Murphy v. International Robotics, Inc.*, 766 So. 2d 1010, 1028-29 (Fla. 2000).

⁴⁸ “The dispositive question in the present case then becomes whether a reasonable fact-finder could conclude that the statements in the [allegedly defamatory piece] imply an assertion that petitioner *Milkovich* perjured himself in a judicial proceeding.” *Milkovich*, 497 U.S. at 19. Rodney A. Smolla, in *Law of Defamation*, § 6.02[1] (1994), expressed the concept in these words: “[r]ather than recognize a constitutional distinction between ‘fact’ and ‘opinion,’ the court recognized a constitutional distinction between ‘fact’ and ‘non-fact.’” Despite the clear overturning of the *Gertz* dictum regarding opinions, some courts still cite that case as authority for the proposition that the First Amendment protects opinions. See *Schuler*, 989 F. Supp at 1384. A more nearly accurate way of describing the law is found in *Schwartz v. American College of Emergency Physicians*, 215 F.3d 1140, 1145 (10th Cir. 2000) (“The First Amendment protects opinions under certain conditions.”). The court cited *Gertz* and *Jefferson County School Dist.* *Id.* (citations omitted). The court added: “[c]ertain expressions of opinion implicitly contain an assertion of objective fact, and such statements are not exempt from a defamation claim.” *Id.*

⁴⁹ *Id.* This was not the first time that the Court used “hyperbole” and similar words to describe constitutionally protected language. See *Bresler*, 398 U.S. at 14; *Austin*, 418 U.S. at 284; *Falwell*, 485 U.S. at 50.

something so ethereal as to be mere hyperbole.⁵⁰ The completely hyperbolic statement is sometimes referred to as “pure opinion”⁵¹ or “non-actionable opinion.”⁵² The reasoning of the Court ruling is that just because a statement is clothed in the form of an opinion does not make it any less damaging to the plaintiff.⁵³

The *Milkovich* Court retained the truth defense: “a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection.”⁵⁴ Falsity is actionable,⁵⁵ and couching falsity in terms of opinion does not make it any the less so.⁵⁶ In a case against the media for speech of public concern about a private individual, the plaintiff bears the burden of proving falsity and fault.⁵⁷

By way of dictum,⁵⁸ the Court in *Milkovich* said that to be actionable, a statement about a public figure or official on a matter

⁵⁰ To use the vernacular, “b.s.” The First Circuit’s opinion in *Levinson’s, Inc.*, 127 F.3d at 128, describes the situation quite well:

The First Amendment’s shielding of figurative language reflects the reality that exaggeration and non-literal commentary have become an integral part of social discourse. For better or worse, our society has long since passed the stage at which the use of the word “bastard” would occasion an investigation into the target’s lineage or the cry “you pig” would prompt a probe for a porcine pedigree. Hyperbole is very much the coin of the modern realm. In extending full constitutional protection to this category of speech, the *Milkovich* Court recognized the need to segregate casually used words, no matter how tastelessly couched, from fact-based accusations.

⁵¹ See *infra* text accompanying note 64.

⁵² See *infra* text accompanying note 64.

⁵³ See *supra* note 47.

⁵⁴ *Milkovich*, 497 U.S. at 20.

⁵⁵ See *id.* at 20 n.7.

⁵⁶ *Id.* As the Court said “[e]ven if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or his assessment of them is erroneous, the statement may still imply a false assertion of fact.” *Id.* at 18-19.

⁵⁷ *Id.* at 16.

⁵⁸ The statements were dicta because the plaintiff in the case was a private figure.

of public concern must imply false and defamatory connotations⁵⁹ regarding that public figure or official, and the statement must have been made with knowledge of its false implications, or with reckless disregard of its truth.⁶⁰ But where the decision in any defamation case is “independently,” “completely” decided by state law, federal review is precluded.⁶¹

Parsing the Court’s opinion in *Milkovich*, what it comes down to is this: if the media makes a statement of fact about a private individual⁶² involving a matter of public concern that is false and damages another, it may be liable for those damages. No damages are recoverable, however, for merely expressing an opinion,⁶³ even if that opinion is false.⁶⁴ Under the First

⁵⁹ The words actually used by the Court were “false and defamatory facts,” but there is no such thing as a “false fact.” See *infra* notes 67, 69 and 71. Other courts have made this same mistake. See *Gross v. New York Times Co.*, 603 N.Y.S.2d 813, 817 (Ct. App. 1993) (saying that “only facts ‘are capable of being proven [sic] false’”). I suggest that the better phrasing is that found in *Seidle v. Greentree Mtg. Co.*, 30 F. Supp. 2d 1292, 1318 (D. Colo. 1989), which stated that an “assertion of fact” may be proved false, rather than the fact itself.

⁶⁰ *Milkovich*, 497 U.S. at 21.

⁶¹ *Id.* at 10. This was an acknowledgment of the Court’s ruling in the *Long* decision, 463 U.S. at 1034. See *supra* text accompanying note 30.

⁶² In light of the *Gertz* statement, see *supra* note 45, there is a question of what law applies to a plaintiff who is not a private person.

⁶³ “Opinion” is a belief or judgment based on grounds insufficient to produce complete certainty.” RANDOM HOUSE WEBSTER’S COLLEGE DICTIONARY 949 (1st ed. 1991). “[A] view, judgment, or appraisal formed in the mind about a particular matter . . . belief stronger than an impression and less strong than positive knowledge.” MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 815 (10th ed. 1995).

⁶⁴ This is what Justice Brennan referred to as “pure” opinion. *Milkovich*, 497 U.S. at 24. Comments *b.* and *c.* of the *Restatement (Second) of Torts* § 566 (1977), explain the difference between “pure” opinion and “mixed” opinion. Pure opinion is not actionable because if the facts on which the statement is based are revealed to the person to whom the statement is made (or that person knows of them), that person is permitted to reach a different conclusion based on those same facts. Mixed opinion may be actionable because the statement does not reveal the facts upon which it is made, and hence the statement may reasonably lead the other person to conclude that it is based on undisclosed, defamatory facts. Judge Robert D. Sack says that “[t]he second Restatement . . . [has] treated deductions based on stated or understood facts as opinion.” See Robert D. Sack, *Protection of Opinion Under the First Amendment: Reflections on Alfred Hill, ‘Defamation and Privacy Under the First Amendment’* 100 COLUM. L. REV. 294, 299 n.23 (2000). In this paper the

Amendment, one may express that opinion without fear of exposing himself to damages for defamation even if the opinion damages another and it is wrong.⁶⁵ Again by way of dictum,⁶⁶ the Court noted that where such an expression of opinion (i.e. it damages another and it is wrong), divulges the basis for making the statement, that basis must be a fact (i.e. it must be true, accurate)⁶⁷ in order for the statement to have constitutional protection.⁶⁸ If it is based on fact, such fact can be proved, because facts are something that exist.⁶⁹ If the basis for such a statement (i.e. one that is wrong and damages another), is not a fact, then damages can be recovered because the statement is not just expressing an opinion it is stating an untruth (i.e. something that is

term "non-actionable opinion" refers to "pure" opinion as that term was used by Justice Brennan and the *Restatement*.

⁶⁵ See *Gosling v. Conagra, Inc.*, No. 95 C 6745, 1996 WL 199738, at *6 (N.D. Ill. Apr. 23, 1996).

⁶⁶ *Milkovich*, 497 U.S. at 18-19.

⁶⁷ A fact is something that actually exists. RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 477 (1st ed. 1991); MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 416 (10th ed. 1995).

⁶⁸ This concept, not often addressed by the courts, is sometimes expressed in the double negative - "[t]he Supreme Court has held that statements that do not contain factual assertions are protected under the First Amendment and may not be the basis of a defamation action." See *Lexecon Inc. v. Milberg Weiss Bershad & Lerach*, 845 F. Supp. 1377, 1388 (D. Ariz. 1993). A United States District Judge in California, by permitting a breach of contract action by a County in bankruptcy against Standard & Poor's for false statements of fact, said that in *Milkovich* "the Supreme Court rejected a bright line division between defamation actions based on false statements of fact and those based on statements of opinion." See *County of Orange v. McGraw-Hill Cos.*, 245 B.R. 138, 147 (C.D. Cal. 1997). In *Riley v. Harr*, 292 F.3d 282, 291-98 (1st Cir. 2002), the author and publisher of the best-seller, *A Civil Action*, which was made into a movie starring John Travolta, brought suit because of statements made in the book about the plaintiffs. The First Circuit carefully analyzed each of the complained of statements in order to determine "whether the challenged statements . . . implicitly signal to readers 'that only one conclusion . . . was possible,' and therefore do not qualify as protected opinion under *Milkovich*, . . . or whether 'readers implicitly were invited to draw their own conclusions from the mixed information provided' in which case the First Amendment bars [the plaintiff's] defamation action." *Id.* at 290.

⁶⁹ A "fact" is not something that might exist in the future. See *Seidl*, 30 F. Supp. 2d at 1317. *Metabolife Int'l, Inc. v. Wornick*, 72 F. Supp. 2d 1160, 1174 (S.D. Cal. 1999).

represented to be a “fact”, but is not). If a statement reveals facts upon which it is based, (and they are truly “facts”, not something supposed to be a fact), it is not actionable because the audience can make its own assessment that the author is using facts to construct his/her/its opinion. The syllogism:

All men are evil
John is a man
Therefore, John is evil

reveals that the author is stating an opinion, based upon the major and minor premises. If the author merely said “John is evil”, the absence of the premises indicates that the author is not merely expressing his opinion about John, but is making a statement of fact - John is evil. While the court did not emphasize this “disclosed sources” defense,⁷⁰ it is of extreme importance. But what if the disclosed “facts” are not fact? To use the above syllogism, what if all men are not evil? Does that make the statement defamatory? Chief Justice Rehnquist indicates that it does. He said that “[e]ven if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or

⁷⁰ Another way of expressing this same concept is the method used by a U.S. District Judge in New Mexico, i.e. “[a]n opinion can be actionable if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.” *Schuler*, 989 F. Supp. at 1384 (quoting *Andrews v. Stallings*, 892 P.2d 611, 615 (N.M. Ct. App. 1995)). Suppose the statement implies that it is based on facts, though it does not explicitly reveal those facts. Is such a statement protected? The Supreme Court did not expressly answer that question. The New York Court of Appeals in *Gross*, 603 N.Y.S.2d at 817, ruled that a statement which does not imply the existence of supporting facts is not actionable. The court in *Abbott v. Harris Pubs.*, 1998 WL 849412, at *5 (S.D.N.Y. Dec. 4 1998), misread *Gross* when it said that “[d]efamatory statements of opinion . . . that are accompanied by a recitation of supporting facts . . . are not [actionable].” Unless the recitation is an accurate representation of these facts the mere addition of such to the statement would not absolve the author of liability. A U.S. District Judge in *Libbra v. City of Litchfield*, 893 F. Supp. 1370, 1378 (C.D. Ill. 1995), said that a statement that implied that it was based on fact does not qualify as a non-actionable opinion, the court making the perhaps overly broad statement that under *Milkovich* “statements of opinion receive full Constitutional protection under the First Amendment.” *Id.*

incomplete?”⁷¹ or if his assessment of them is erroneous, the statement may imply a false assertion of fact.”⁷² Some of the progeny have misconstrued this “disclosed sources” defense.⁷³

The *Milkovich* Court said that there were three ways for expressing non-actionable “opinion”,⁷⁴ e.g. (1) use some loose, figurative, hyperbolic⁷⁵ language to describe John, or (2) make the “tenor” of the statement about John such as to negate the impression that a statement of fact was being made, or (3) describe John in such a way that the description cannot be proved true or false.

While the Court did not specifically announce a test for distinguishing between non-actionable “opinion” and actionable (i.e. incorrect) statement of fact, in effect it did so by announcing that it considered the three factors referred to above:⁷⁶

(1) were the words used “the sort of loose, figurative or hyperbolic language which would negate the impression that the writer was seriously maintaining that” the plaintiff was guilty of wrongdoing (the “hyperbole” factor);⁷⁷

⁷¹ As pointed out elsewhere in this paper, *see supra* notes 59, 67 and 69, a fact, being a fact, cannot be incorrect or incomplete. *See* Thomas J. Tracy, *Thou Shalt Not Use His Name in Vain - The Misapplication of Milkovich v. Lorain Journal: Spence v. Flynt*, 26 CREIGHTON L. REV. 1221, 1262 (1993), in which he refers to “true facts.”

⁷² *Milkovich*, 497 U.S. at 18.

⁷³ In *Douglas v. Pratt*, No. CIV 98-416-M, 2000 WL 1513712, at *5 (D.N.H. Sept. 29, 2000 (not for publication), the court granted judgment on the pleadings for the defendant simply because a newspaper article disclosed the sources upon which it was based.

⁷⁴ *Milkovich*, 497 U.S. at 21-22.

⁷⁵ Hyperbole is an obvious and intentional exaggeration. RANDOM HOUSE WEBSTER’S COLLEGE DICTIONARY 661 (1st ed. 1991).

⁷⁶ *Milkovich*, 497 U.S. at 21-22.

⁷⁷ *Id.* Quoting from *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966), the Court assigned two reasons for adopting such a “hyperbole defense” rather than an “opinion privilege”: the First Amendment guarantees “free and uninhibited discussion of public issues,” and that “‘important social values . . . underlie the law of defamation.’ ” *Id.* The Court added that it has regularly “recognized that ‘[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation.’ ” *Milkovich*, 497 U.S. at 22.

(2) did the “general tenor of the article negate this impression” (the “general tenor” factor);⁷⁸

(3) was the connotation that the plaintiff was guilty of wrongdoing “sufficiently factual to be susceptible of being proved true or false.” (the “verifiability” factor)⁷⁹

The Court did not say whether all factors must be considered, or if it is sufficient to consider only one or two.⁸⁰ It would seem that the distinction between factor (1) and factor (3) is tenuous; or that factor (1) is an embellishment of factor (3).⁸¹ Perhaps this is the reason that many of the progeny have constructed another factor - the “context” of the statement.⁸²

Any statement that fits one of the above factors would be non-actionable, not because the statement is correct, or did not damage the subject, but because its hyperbolic nature, or its tenor reveals that it was not an expression of fact, or that it was non-

⁷⁸ *Id.* The Court also referred to the “tenor and context” of the statement. See *id.* at 18.

⁷⁹ *Id.* at 22. At other places in the Court’s opinion it expressed this test in slightly different language. For instance, “[t]he dispositive question in the present case . . . becomes whether a reasonable factfinder could conclude that the statements . . . imply an assertion that [the plaintiff committed wrongs].” *Id.* at 21. This complements an earlier statement by the Court to the effect that “expressions of ‘opinion’ may often imply an assertion of objective fact.” *Id.*

⁸⁰ No court has dealt with this issue *per se*, but the Fourth Circuit Court of Appeals in *Potomac Valve and Fitting, Inc. v. Crawford Fitting Co.*, 829 F.2d 1280, 1288 (4th Cir. 1987), a case which has now been discredited by the Fourth Circuit on other grounds stated that *any* of the three factors it developed would establish the statement as opinion. *Biospherics, Inc. v. Forbes, Inc.*, 151 F.3d 180, 183-84 (4th Cir. 1998). The court in *Dodson v. Dicker*, 812 S.W.2d 97, 98, 99 (Ark. 1991), indicated that only one of the three factors (which it called “categories”), need be considered.

⁸¹ It has been said that hyperbole is used to “embellish” disclosed facts. See *Colon v. Town of West Hartford*, No. Civ. 3:00 CV168(AHN), 2001 WL 45464, at *5 (D. Conn. 2001). The Ninth Circuit has said that “[b]ecause the challenged statement is rhetorical hyperbole, it is not capable of verification” *Bidart v. Huber*, 2001 WL 577009, at *2 (9th Cir. 2001).

⁸² It has been opined that the Court’s failure to construct a separate “context” factor was not a rejection of its importance, but merely a discounting of “context” in the circumstances of the case. See the District of Columbia Circuit’s opinion in *Moldea v. New York Times Co.*, 22 F.3d 310, 314 (D.C. Cir. 1994) and *Matuskevitch v. Telnikoff*, 877 F. Supp. 1, 5 (D.D.C. 1995). I have taken the position in this paper that “context” is simply another form of the “tenor” factor. See *infra* text accompanying notes 283-312.

verifiable; it must be simply the author's opinion, and under the First Amendment everyone is entitled to his/her/its opinion.⁸³ This is the *Milkovich* doctrine.⁸⁴ The three-part "test" established by *Milkovich* for differentiating between a statement of fact and a non-actionable opinion,⁸⁵ seemingly overruled a four-factor test established by the District of Columbia Circuit,⁸⁶ which had been adopted and slightly expanded by the Eighth Circuit.⁸⁷ The demise of the four-factor test was predicted shortly before the Court's

⁸³ It has been opined that "*Milkovich* did not hold that statements of opinion are never entitled to constitutional protection under the First Amendment." See *Rearick v. Refkovsky*, No. CV95043978 S, 1995 WL 681474, at * 2 (Conn. Super. Ct. 1995).

⁸⁴ Chief Judge Richard Posner of the Seventh Circuit, expressed the ruling in the following words: "[a] statement of fact is not shielded from an action for defamation by being prefaced with the words 'in my opinion,' but if it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable." *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993). Judge Selya of the First Circuit has expressed it in the following words: "the First Amendment prohibits defamation actions based on loose, figurative language that no reasonable person would believe presented facts." *Levinsky's Inc.*, 127 F.3d at 128. "A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." The Restatement (Second) of Torts § 566 (1977).

⁸⁵ See *supra* text accompanying notes 74-79.

⁸⁶ See *Ollman*, 750 F.2d at 979. The thesis of *Ollman* is that the court should look to the totality of the circumstances in which the statement is made. In order to do so the court must consider four factors: (1) the common usage or meaning of the specific language of the challenged statement itself; (2) the statement's verifiability; (3) the full context of the statement; and (4) the broader context or setting in which the statement appears. The Supreme Court denied certiorari, despite a rigorous dissent by then Justice Rehnquist, the author of *Milkovich*. See *Ollman v. Evans*, 471 U.S. at 1127-29.

⁸⁷ See *Janklow*, 788 F.2d at 1302. Janklow's thesis was that "the statement must be taken as part of a whole, including tone and the cautionary language. In order to do so the court must consider four factors: (1) the statement's precision and specificity, (2) its verifiability, (3) its literary context, and (4) its public context. It was adopted by the Ohio Supreme Court in what was to become the companion case to *Milkovich*, *Scott v. News Herald*, 496 N.E.2d 699, 706 (Ohio 1986).

judgment in *Milkovich* was rendered.⁸⁸ As will be seen by the cases discussed in this paper, such prediction was overstated.

Any question as to the role of the states in defamation law after the *Milkovich* decision was answered by the Court during the following term in *Masson v. New Yorker Magazine, Inc.*⁸⁹ The Court reiterated the proclamation made in *Gertz*⁹⁰ to the effect that the states⁹¹ have a legitimate interest underlying the law of defamation, and that *Milkovich* recognized this;⁹² but (and this is an important “but”), the First Amendment “limits” state law in “various respects.”⁹³ The Court has thus far left unanswered the question of to what extent the constitutional, statutory and case law of the states will affect that “limitation.” *Milkovich*’s progeny are, to some extent, filling the interstices.

The *Milkovich* doctrine is not simply one of application - if the media makes a statement about a non-public official/figure that defames him/her⁹⁴ such a statement is protected by the First Amendment if a reasonable person could conclude either that the

⁸⁸ See Justice Yetka’s dissent in *Diesen v. Hessburg*, 455 N.W.2d 446, 462 (Minn. 1990), in which he said: “it is not surprising that the Harte-Hanks Court refused to adopt the Janklow/Ollman opinion analysis as controlling first amendment law.”

⁸⁹ See *Masson*, 501 U.S. at 496. This case also established that “[m]inor inaccuracies do not amount to falsity so long as ‘the substance, the gist, the sting, of the libelous charge be justified.’” *Id.* at 517.

⁹⁰ See *supra* note 41.

⁹¹ The State involved in that case was California.

⁹² *Mason*, 501 U.S. at 516.

⁹³ *Id.* at 511. The First Circuit recognized this when it wrote in *Veilleux v. National Broad. Co.*, 206 F.3d 92, 108 (1st Cir. 2000), “The Supreme Court of the United States has determined that the federal constitution imposes certain requirements on defamation actions independent of those established by the state’s own law. See generally *Milkovich* . . .” The three “requirements” referred to by the court were “[f]irst, where the statements are uttered by a media defendant and involve matters of public concern, the plaintiff must shoulder the burden of proving the falsity of each statement.” *Id.* “Second, only statements that are ‘provable as false’ are actionable; hyperbole and expressions of opinion are constitutionally protected.” *Id.* “Third, private individuals must prove fault amounting at least to negligence on the part of a media defendant, at least as to matters of public concern.” *Id.*

⁹⁴ The *Restatement of Torts* says that a communication is defamatory “if it tends to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” RESTATEMENT (SECOND) OF TORTS § 559 (1977).

media was making the statement based on the assertion of facts which were true,⁹⁵ or that no reasonable person could conclude that the statement was an assertion of fact, in which case the statement is also protected by the First Amendment. Further contributing to the difficulty of application is the Court's failure to define whether "opinion" is an element of the defamation itself, or is "opinion" merely an affirmative defense.⁹⁶

The *Milkovich* case concerned a private person's defamation action against the media for a statement about a matter of public concern, in which the plaintiff has been referred to as a "limited purpose public figure."⁹⁷ Curious as to whether the application of *Milkovich* depended upon the status of the parties I arranged the progeny into eight categories, according to their procedural distinctions as to the complaining party and the defending party.⁹⁸

⁹⁵ Sometimes incorrectly referred to as "true facts." See *supra* notes 59, 67, 69 and 71.

⁹⁶ As this paper will demonstrate, most courts consider that "opinion" is an affirmative defense. See *infra* text accompanying notes 352-59.

⁹⁷ It has been opined that three elements are required to establish this "limited purpose public figure" plaintiff: (1) a public controversy; (2) an individual's purposeful or prominent role in that controversy; and (3) a relationship between the allegedly defamatory statement and the public controversy. See also *Hunter v. Hartman*, 545 N.W.2d 699, 704 (Minn. Ct. App. 1996); see also *Sculimbrene v. Reno*, No. CIV. A.99-2010(CKK), 2001 WL 096069, at *12 (D.D.C. 2001); *Kisser v. Coalition for Religious Freedom*, 1995 WL 3996, at *1 (N.D. Ill. 1995). A U.S. District Judge in Pennsylvania rejected Plaintiff's assertion that *Milkovich* represented a "turn of direction in favor of high profile victims of defamation." See *Tucker v. Fischbein*, No. CIV. A. 97-4717, 1999 WL 58586, at *6 (E.D. Pa. 1999). Another U.S. District Judge in Pennsylvania held that under *Milkovich* a private-figure plaintiff (a self employed buyer and seller of engine parts), was required to prove that a non-media defendant (a manufacturer of anti-theft tracking systems), need not prove falsity about a statement made concerning a matter of public interest (thievery), in order to prove defamation. See also *Fanelle v. Lojack Corp.*, No. CIV A. 99-4292, 2000 WL 1801270, at *8 (E.D. Pa. 2000).

⁹⁸

Category	Plaintiff	Defendant	Subject Matter
I	Non-Public Official/Figure	Media	Public Matter
II	Public Official/Figure	Media	Public Matter
III	Public Official/Figure	Non-Media	Public Matter
IV	Non-Public Official/Figure	Non-Media	Public Matter
V	Public Official/Figure	Non-Media	Private Matter

Some of its progeny have dealt with the same type of parties as did *Milkovich* itself, i.e., a private person, designated as a "limited purpose public figure" in an action against the media. I refer to them as Category I cases. Other progeny have dealt with public official/public figure actions against the media; I call these cases Category II. There are six other types of action - all against non-media defendants - in which many courts apply *Milkovich* in various ways.⁹⁹ Actions by public officials/public figures against non-media defendants involving public matters I call Category III. Category IV encompasses the private persons' actions against non-media defendants about matters of public concern. Public official/public figure actions against non-media defendants involving private matters have been gathered into Category V.

VI	Non-Public Official/Figure	Non-Media	Private Matter
VII	Media	Media	Public Matter
VIII	[other types of actions]		

⁹⁹ As mentioned earlier in this paper, *see supra* note 43, *Milkovich* dealt with a media defendant and unless the *Michigan v. Long* doctrine, *see supra* text accompanying note 30 applies, the courts would be required to apply the *Milkovich* doctrine to media-defendant cases. Certainly media-defendant cases are primary subjects for First Amendment treatment. *See Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1091-92 (4th Cir. 1993) (Category I case), in which the court said:

Although Virginia's common law of libel governs this diversity case, the First Amendment's press and speech clauses greatly restrict the common law where the defendant is a member of the press, the plaintiff is a public figure, or the subject matter of the supposed libel touches on a matter of public concern Where, as here, all of these considerations are present, the constitutional protection of the press reaches its apogee.

Id. (citation omitted). The New Jersey Supreme Court has noted a distinction between cases involving the media and those involving non-media defendants, observing that "generally . . . a measure of thought preceded the words printed" and not so those uttered by the non-media defendant. *See also Ward v. Zelikovsky*, 643 A.2d 972, 978 (N.J. 1994) (Category VI case). All of *Milkovich*'s principles, however, have been dealt with by almost all of the courts in some manner, even in non-media cases. A U.S. District Judge in New Hampshire found *Milkovich*'s "holdings on the opinion verses fact issue instructive." *See also Godfrey v. Perkins-Elmer Corp.*, 794 F. Supp. 1179, 1191 n.12 (D.N.H. 1992) (Category VI case). *But see infra* text accompanying notes 103-10.

Some progeny deal with private persons suing non-media defendants about defamation involving private matters; these are in Category VI. Category VII are the cases in which media plaintiffs sue media defendants for defamation. Lastly Category VIII are non-defamation cases in which *Milkovich* is mentioned.¹⁰⁰ No particular pattern, as to the manner in which the courts have resolved the fact/opinion dichotomy, is apparent from grouping the *Milkovich* progeny into categories,¹⁰¹ though for the sake of

¹⁰⁰ The opinion/fact dichotomy plays its part in resolving even Category VIII cases. As an example, in *Sands v. Living World Fellowship*, 34 P.3d 955, 960 (Alaska 2001) (Category VIII case), a church parishioner filed an action against another church for negligence, intentional infliction of emotional distress and abuse of process for attempts to “shun” and “disfellow” members of his church from the Christian community. The Alaska Supreme Court found that though the complaint did not assert a defamation claim, the plaintiff did allege that the defendants made “false accusations” against the plaintiff’s church, but “because there are not factual statements capable of being proven true or false, they are not actionable as a basis in a defamation claim.” *Id.* In certain other Category VIII cases the opinion/fact inquiry of *Milkovich* plays no role at all. In *Fuente Cigar*, 985 F. Supp. at 1457, *Milkovich*’s sole contribution was to offer support to the court’s conclusion that prefacing defamation with “in our opinion” offers no “talismanic immunity.” See also *Libbra v. City of Litchfield*, 893 F. Supp. 1370 (C.D. Ill. 1995) (Category VIII case), and *Matusevich*, 877 F. Supp. at 1 (Category VIII cases), which merely mentioned *Milkovich*, but used none of its teachings. Such cavalier treatment of *Milkovich* is not limited to Category VIII cases. See *Schuler v. McGraw-Hill Cos.*, 989 F. Supp. 1377, 1384 (D.N.M. 1997) (Category II case), in which *Milkovich* was mentioned solely to prove that there is “no constitutional privilege for opinion, apart from protections delineated in prior cases.”

¹⁰¹ Coincidentally, Prof. Kathryn Dix Sowle found that after eight years of *Milkovich* history the lower court cases fall into eight categories, using a different analysis, to wit: (1) those that state or imply false statements of fact; (2) those that apply the *Restatement*’s “pure opinion” rule; the use of a multifactor analysis that immunizes statements; (3) because they are reasonably understood as expressing the speaker’s point of view; (4) because reliable evidence is unavailable on the issue of falsity; (5) that are ambiguous; (6) the statements are factual; (7) the statements are hyperbole and invective; and (8) merely conclusions of the courts without accompanying analysis. See Kathryn Dix Sowle, *A Matter of Opinion: Milkovich Four Years Later*, 3 WM. & MARY BILL OF RTS. J. 467 (1994). I part with Prof. Sowle because her third category is insufficient in detail, her fourth and sixth categories are virtually the same, her fifth category does not exist as a rationale used by the courts, and her seventh category is just one part of a three part test proclaimed by the court. I object to her category eight as it seems to me that the progeny have always analyzed the

completeness, each case referred to in this paper has been identified as to which category it belongs.¹⁰²

Courts Which Ignore Milkovich or Consider it Inapplicable on Other than State Grounds

At least two cases decided since *Milkovich* have simply ignored it in the resolution of the issues involved.¹⁰³ In some decisions it is mentioned only in a dissenting opinion.¹⁰⁴

issue and assigned a reason for their decisions, albeit not in line with what *Milkovich* ruled.

¹⁰² Virtually all of the cases reviewed in this paper have considered *Milkovich*, and either accepted it or rejected it in resolving the issue or issues before the court. In not all of the cases, however, was *Milkovich* the prime reason for the decision. In Category II cases the actual decision may turn on some point other than "opinion," the prime consideration being one of malice. In Category VIII cases defamation may not be established, and hence there is no need to consider the "opinion" issue. There are cases which merely mention *Milkovich*, almost in passing, but do not incorporate it into the decision. As an example, *Matter of Westfall*, 808 S.W.2d 829, 833 (Mo. 1991) (Category VIII case), in which the Supreme Court of Missouri simply proclaimed that *Milkovich* refused to recognize the artificial dichotomy between fact and opinion; See *Standard Jury Instructions Civil Cases*, 795 So. 2d 51, 55-56 (Fla. 2001), in which the Florida Supreme court referred to *Milkovich* in connection with the promulgation of standard jury instructions. These cases generally have not been included within the "progeny" of *Milkovich* in this paper.

¹⁰³ See *Newton*, 930 F.2d at 662, *Janklow*, 459 N.W.2d at 415 (Category II case). In *Newton*, the Ninth Circuit reversed a jury verdict in favor of the entertainer, Wayne Newton who sued a television network and journalists because of their broadcasts about questionable financing of his purchase of a gaming casino in Las Vegas. The basis of the court's decision was that there was no showing of malice to support an award in favor of a public personage. In *Janklow*, the author and publisher of a book were sued by William Janklow, sometimes Governor of South Dakota, because of a statement in the book which relates the accusation of a fifteen year old Indian girl about being raped by Gov. Janklow. Using the four factor test from the Eighth Circuit's *Janklow* decision, see *supra* note 87, the State Supreme Court, twenty-seven days after the rendition of *Milkovich*, without mentioning that case, affirmed a defendant's summary judgment. The dissenting judge, citing *Milkovich* as authority, wrote: "[i]n the present case, the question becomes whether or not a reasonable factfinder could conclude that the many statements in this book imply assertions that Janklow actually did all of the outlandish acts referred to . . ." *Janklow*, 459 N.W.2d at 428.

In some cases the court will mention *Milkovich*, but not apply it for various reasons. A “private plaintiff/ private issue” reason has been assigned.¹⁰⁵ The United States First Circuit in a case emanating from Puerto Rico has refused to apply it in an action by a non-public figure against a non-media defendant¹⁰⁶ The Fourth Circuit in cases emanating from Virginia and Maryland has refused to apply *Milkovich* where private plaintiffs sued non-media defendants concerning private matters.¹⁰⁷ The Territorial Court of the Virgin Islands has refused to consider First Amendment protections and *Milkovich*, where the plaintiff is neither a public official nor public figure and the defendant is non-media.¹⁰⁸

At least one state appellate court has refused to consider *Milkovich* because the First Amendment issue was raised for the first time on appeal.¹⁰⁹ In another case, even though a trial court considered *Milkovich*, at the trial level, where a party did not lose its verdict (because of a denial of a Motion for Judgment N.O.V.), that party could not raise the point on appeal.¹¹⁰

¹⁰⁴ See *Gannett Co., Inc. v. Kanaga*, 750 A.2d 1174, 1192 n.17, 1193 n.19, 1194 (Del. 2000) (Category I case); *Falk & Mayfield, L.L.P. v. Molzan*, 974 S.W.2d 821, 831 (Tex. Ct. App. 1998) (Category VII case); *Scott v. Flowers*, 910 F.2d 201, 215 (5th Cir. 1990) (Category III case); *Jenkins v. Weis*, 868 P.2d 1374, 1381 (Utah Ct. App. 1994) (Category IV case); *Bauer v. Murphy*, 530 N.W.2d 1, 9-10 (Wis. Ct. App. 1995) (Category VI case).

¹⁰⁵ See *Roffman, v. Trump*, 754 F. Supp. 411, 415 (E.D. Pa. 1990) (Category VI case), (noting that “the Supreme Court has ‘federalized’ defamation law as it relates to public figures or issues of public concern, the Court has created few restrictions on state defamation law with respect to suits brought by private plaintiffs based on speech relating to issues of private concern.”).

¹⁰⁶ See *Emerito Estrada Rivera-Isuzu de P.R., Inc. v. Consumers Union of United States, Inc.*, 233 F.3d 24, 28 (1st Cir. 2000) (Category VI case).

¹⁰⁷ See *Swengler v. ITT Corp.*, 993 F.2d 1063, 1071 (4th Cir. 1993) (Category VI case); and *Lapkoff v. Wilks*, 969 F.2d 78, 81 (4th Cir. 1997) (Category VI case).

¹⁰⁸ See *Callender v. Nichtern*, No. 1005/93, 1995 WL 409028, at *3 (V.I. June 30, 1995) (Category IV case) (incorrectly finding that in *Milkovich* the plaintiff was a public official or public figure).

¹⁰⁹ See *Holtzscheiter v. Thomson Newspapers, Inc.*, 506 S.E.2d 497, 503 n.10 (S.C. 1998) (Category I case).

¹¹⁰ See *McDermott v. Biddle*, 647 A.2d 514, 529-31 (Pa. Super. Ct. 1994) (Category II case).

The Courts Which Refuse to Follow Milkovich on State Grounds

Milkovich recognized that under *Michigan v Long*,¹¹¹ if a case can be determined on non-constitutional grounds the First Amendment will not be considered in review.¹¹² Some courts have assigned as reasons for not following *Milkovich* the fact that their state constitutions afford equal or greater protection for free speech than does the First Amendment.¹¹³

Colorado

The Colorado Supreme Court has taken the position that both the First Amendment and the Colorado Constitution protect free speech, and hence the manner in which the courts of its state will determine whether a statement is actionable fact or non-actionable opinion is governed by one of its pre-*Milkovich* decisions.¹¹⁴ When it came to structuring a test, however, the court referred to *Milkovich*, and a two-part test that it created was similar to, but not identical with that of the *Milkovich* decision.¹¹⁵ A U.S.

¹¹¹ See *supra* note 30.

¹¹² See *supra* text accompanying note 61.

¹¹³ At least one court in California has specifically rejected the idea that the California Constitution provides broader protection than does the First Amendment. See *Edwards v. Hall*, 285 Cal. Rptr. 810, 821 (Cal. Ct. App. 1991) (Category VI case), in which the head of a local civil rights organization sued the well known talk show host, Arsenio Hall, for having referred to him as a "fuckin' extortionist [who] uses his position to ah . . . to take advantage." The court in *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 116 (Tex. 2000) (Category II case), said that any extra protection for free speech comes from the Texas common law, rather than its state Constitution.

¹¹⁴ *Burns v. McGraw-Hill Broad. Co.*, 659 P.2d 1351, 1358 (Colo. 1983).

¹¹⁵ In *Keohane v. Stewart*, 882 P.2d 1293, 1299 (Colo. 1994) (Category II case), the court said that the two inquiries are "whether the statement is sufficiently factual to be susceptible of being proved true or false," and "whether reasonable people would conclude that the assertion is one of fact" and that the relevant factors for the second inquiry are "(1) how the assertion is phrased; (2) the context of the entire statement; and (3) the circumstances surrounding the assertion." To the same effect see *NBC Subsidiary (KCNC-YV), Inc. v. Living Will Center*, 879 P.2d 6, 10-11 (Colo. 1994) (Category I case), decided the same day. Prior to the Colorado Supreme Court decisions a Colorado trial judge in a defamation case used *Milkovich's* hyperbole and verifiability factors. See *Hannon v. Timberline Publishing, Inc.*, No. 90-CV-9, 1991 WL 23787, at *2 (Dist. Co. Colo. Aug. 7, 1991) (Category I case).

District Court Judge used *Milkovich* and the same pre-*Milkovich* decision¹¹⁶ in structuring a two-part test for resolving the fact/opinion issue.¹¹⁷

New Jersey

The Appellate Division of the New Jersey Superior Court did not attempt to determine whether the defendant in a defamation case was protected by First Amendment principles per *Milkovich* because “our law as applied in this case is at least as protective of free speech as federal law would be.”¹¹⁸

New York

In 1986, the New York Court of Appeals adopted the *Ollman*¹¹⁹ test.¹²⁰ In 1991, that court had before it a case in which the editor of a scientific journal was sued for his publication of a signed letter to the editor on a subject of public controversy.¹²¹ The case had been remanded to the court by the U.S. Supreme Court to reconsider in light of *Milkovich*. The court said that *Milkovich* left unaltered *Ollman*’s first two factors, to wit: (1) the article’s specific words as commonly understood, and (2) whether the statements were verifiable.¹²² It said that *Milkovich* truncated the third factor (the immediate context of the article), and the fourth factor (the broader context), into the type of speech uttered, i.e. the “rhetorical hyperbole, vigorous epithets, and lusty and imaginative expression” found in *Falwell*,¹²³ *Austen*¹²⁴ and

¹¹⁶ *Burns*, 659 P.2d 1351.

¹¹⁷ See *Seidle v. Greentree Mortgage Co.*, 30 F. Supp. 2d 1292, 1316-18 (D. Colo. 1998) (Category VIII case).

¹¹⁸ See *Cassidy v. Merlin*, 582 A.2d 1039, 1048 (N.J. Super. Ct. App. Div. 1990) (Category III case).

¹¹⁹ See *supra* note 86.

¹²⁰ See *Steinhilber v. Alphonse*, 501 N.E.2d 550, 555 (N.Y. 1986), in which describing a union member as a “scab” who lacked talent, ambition and initiative was found to be pure opinion.

¹²¹ See *Immuno AG. v. Moor-Jankowski*, 567 N.E.2d 1270 (N.Y. 1991) (Category I case).

¹²² *Id.* at 1274.

¹²³ 485 U.S. at 46.

¹²⁴ 418 U.S. at 264.

Bresler.¹²⁵ The court held that summary judgment for the defendant was proper on federal grounds under *Milkovich* and on state grounds under the separate and independent privilege of Article I, Section 8 of New York's Constitution.¹²⁶

In the following year, 1992, the Court of Appeals revisited the matter.¹²⁷ Justice Simons, who thought that the prior case should have been decided under federal law, authored a unanimous opinion which said that the federal test was the narrower of the two, but "[u]nder either Federal or State law, the dispositive question is whether a reasonable listener at the hearing could have concluded that [the defendant] was conveying facts about the plaintiff."¹²⁸

In the year following that case, 1993, the Court of Appeals in an unanimous opinion¹²⁹ authored by Justice Titone, who thought that the court's first decision on the subject should have been decided solely on state grounds,¹³⁰ barely mentioned *Milkovich*.¹³¹ The court coalesced the four *Ollman* factors,¹³² into three: (1) whether the specific language at issue has a precise meaning which is readily understood, (2) whether the statements are capable of being proved true or false, and (3) "whether either

¹²⁵ 398 U.S. at 6. According to the *Immuno* court, *Milkovich* struck the following balance: "between First Amendment protection for media defendants and protection for individual reputation: except for special situations of loose, figurative, hyperbolic language, statements that contain or imply assertions of provably false fact will likely be actionable." *Immuno*, 567 N.E.2d at 1275.

¹²⁶ Two judges thought that the case should have been decided on federal law alone, and one judge thought that it should have been decided by state common law. *Id.* at 1282.

¹²⁷ See *600 West 115th Street Corp. v. Von Gutfeld*, 603 N.E.2d 930, 938 (N.Y. 1992) (Category IV case), in which the statement of one tenant at a public hearing on another tenant's zoning permit application, that the plaintiff's lease was "as fraudulent as you can get and it smells of bribery and corruption," was defamatory.

¹²⁸ *Id.* at 934.

¹²⁹ *Gross v. New York Times Co.*, 623 N.E.2d 1163 (N.Y. 1993) (Category II case).

¹³⁰ See *supra* note 126.

¹³¹ *Milkovich* was cited for the proposition that "the Court recognized that there are constitutional restrictions on the 'permissible scope' of defamation actions and, specifically that evident 'rhetorical hyperbole' is simply non actionable." *Id.* at 1167.

¹³² See *supra* note 86.

the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to “signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact,”¹³³ and decided the case based on state law.¹³⁴

The federal courts, which are required to follow state law in these diversity cases, are understandably having a difficult time knowing whether cases from New York should be decided under *Milkovich* or under the New York Constitution or both. The United States Second Circuit Court of Appeals in 1997 said that “[w]hile New York’s tripartite inquiry . . . does and is intended to differ from the inquiry under the First Amendment . . . we note that the thrust of the dispositive inquiry under both New York and constitutional law is whether a reasonable [reader] could have concluded that [the publications were] conveying facts about the plaintiff.”¹³⁵

In 2000, the Second Circuit said that the central issue on appeal is whether the challenged statements are protected by “either the United States Constitution or the New York

¹³³ *Gross*, 623 N.E.2d at 1167 (citing *Steinhilber*, 501 N.E.2d at 550) (quoting *Ollman*, 750 F.2d at 983).

¹³⁴ *Id.* at 1170. In *McGill v. Parker*, 582 N.Y.S.2d 91, 97 (1st Dep’t 1992) (Category VII case), in which a complaint was filed by carriage horse owners and operators against animal rights activists alleging defamation because of New York City’s treatment of carriage horses, the Appellate Division noted that the Supreme court in *Milkovich* had not resolved the question of whether the first Amendment provides different standards of protection for the institutional media from those provided non-media defendants.

¹³⁵ See *Levin v. McPhee*, 119 F.3d 189, 197 (2d Cir. 1997) (Category I case), in which the subject of a book sued the author, his publisher and a magazine which published excerpts slightly before its publication, claiming that he was defamed by an accusation of cowardice and complicity in a K.G.B.-orchestrated murder. The subquotes are taken from the lower court’s decision in *Gross*, 623 N.E.2d at 1167. Two years before this case, the Second Circuit, finding that the Lanham Act had not been violated, saw no reason to consider *Milkovich*. See *Groden v. Random House, Inc.*, 61 F.3d 1045, 1052 n.2 (2d Cir. 1995) (Category VIII case), though it was cited in *CYTYC Corp.*, 12 F. Supp. 2d 296, 302 (S.D.N.Y. 1998) (Category VIII case), as standing for the proposition that describing an author as “guilty of misleading the American public,” is merely non-actionable opinion; it should be remembered that these were both Lanham Act cases, and hence, *Milkovich* was not automatically applicable to cases in which defamation *vel non* is the prime issue to be resolved.

Constitution,”¹³⁶ and found the statements actionable under both.¹³⁷ Just four months later, the Second Circuit said that “[u]nlike the Federal Constitution the New York Constitution provides an absolute protection of opinion.”¹³⁸ The Court came full circle by using the four factor test that New York had adopted¹³⁹ in 1986 in *Steinhilber v. Alphonse*.¹⁴⁰ The United States district courts in New York that have cited *Milkovich* are a potpourri of decisions grouping for a theme.¹⁴¹ In one case, a

¹³⁶ See *Flamm v. American Ass'n of Univ. Women*, 201 F.3d 144, 147 (2d Cir. 2000) (Category I case) in which a lawyer who was listed in a non-profit organization's directory as being described by at least one of his clients as “an ambulance chaser” and who was interested only in “slam dunk cases.”

¹³⁷ See *id.* at 148-53 (discussing the federal standard); *id.* at 153-55 (discussing the New York standard).

¹³⁸ See *Celle v. Filipino Reporter Enterprises, Inc.*, 209 F.3d 163, 178 (2d Cir. 2000) (Category VII case), in which a radio commentator and the station that broadcasted his messages sued a newspaper and its editor alleging that they were defamed in three articles.

¹³⁹ See *supra* text accompanying notes 120-21.

¹⁴⁰ 501 N.E.2d at 550.

¹⁴¹ The same judge in *Don King Productions, Inc. v. Douglas*, 742 F. Supp. 778, 782 (S.D.N.Y. 1990) (Category V case), used *Milkovich*'s verifiability test and in *McNally v. Yarnell*, 764 F. Supp. 838, 849 (S.D.N.Y. 1991) (Category IV case), said that in light of *Milkovich*, New York courts will continue to follow the principle of taking into account the full context of challenged speech as set forth in *Steinhilber*. The court in *Church of Scientology Intern. v. Eli Lilly & Co.*, 778 F. Supp. 661, 667 (S.D.N.Y. 1991) (Category III case), thought that *Immuno AG v. Moor-Jankowski*, 501 N.E.2d 1270 (N.Y. 1991), applied the *Milkovich* standards. The judges in *J & J Sheet Metal Works, Inc. v. Picarazzi*, 793 F. Supp. 1104 (N.D.N.Y. 1992) (Category IV case), and *Coliniatis v. Dimas*, 848 F. Supp. 462, 467-68 (S.D.N.Y. 1994) (Category VI case), considered both the New York constitution and *Milkovich* and found that both required the same conclusion. The judge in *Coliniatis* thought that *Milkovich* proclaimed a two-factor test. *Id.* at 467. *Weinstein v. Friedman*, No. 94 CIV. 6803, 1996 WL 137313, at *181 (S.D.N.Y. Mar. 26, 1996) (Category II case), followed *Gross v. New York Times Co.*, 603 N.Y.S.2d 813 (Ct. App. 1993). *Abbott v. Sucich*, No. 95 CIV 5678 (RPP), 1996 WL 453077 (S.D.N.Y. Aug. 09, 1996) (Category VI case), followed the U.S. and the state constitutions and applied *Steinhilber*. The judge in this case believed that *Milkovich* proclaimed a two-factor test. *Id.* at *2. *Corporate Training Unlimited, Inc. v. N.B.C.* 981 F. Supp. 112, 119 (E.D.N.Y. 1997) (Category I case) and *CYTYC Corp.*, 12 F. Supp. 2d 296, 301 (S.D.N.Y. 1998) (Category VIII case), thought that New York law governed, citing the three stage test of *Levin v. McPhee*, 119 F.3d 189 (2d Cir. 1997) hardly mentioning *Milkovich*. *Abbott v. Harris Publ'ns, Inc.*, No.

District Court Judge found that under New York law, opinion is not protected.¹⁴²

Ohio

Ohio was the state which spawned *Milkovich*. One would think from the first two Ohio cases that were decided after the Supreme Court decision, that Ohio felt bound by it. In the first case, in which a medical equipment distributor brought a defamation action against a newsletter publisher, the District Judge denied a Rule 12(b)(6) motion to dismiss because, considering the whole record,¹⁴³ the allegations made in the complaint were provable.¹⁴⁴ Two years later an intermediate state appellate court affirmed the grant of a directed verdict for the defendant under *Milkovich*'s provability and "general tenor" tests.¹⁴⁵

In 1995, however, the Ohio Supreme Court wrote: "Regardless of the outcome in *Milkovich*, the law in this state is that embodied in *Scott*."¹⁴⁶ The Ohio Constitution provides a

97 CIV. 7648 JSM, 1998 WL 849412, at *5 (S.D.N.Y. Dec. 4, 1998) (Category I case), thought that both constitutions applied, citing the now discredited *Potomac Valve* case, see *supra* note 80, and *Gross Protic v. Dengler*, 46 F. Supp. 2d 277, 281 (S.D.N.Y. 1999) (Category VI case), followed the Court of Appeals decision in *Immuno*, and the Second Circuit decision in *Levin* and *Gross*, and said that *Milkovich* "cut back somewhat on *Gertz*' implications for statements of opinion." *Belly Basics, Inc. v. Mothers Work, Inc.*, 95 F. Supp. 2d 144, 145 (S.D.N.Y. 2000) (Category IV case), thought that *Milkovich* established that *there is no "bright line test" for differentiating statements of fact from opinions; it cited Milkovich for hyperbole.*

¹⁴² *Scholastic, Inc. v. Stouffer*, 124 F. Supp. 2d 836, 850 (S.D.N.Y. 2000) (Category III case). J.K. Rowling, the creator of the popular "Harry Potter" series, and her publisher brought a Lanham Act suit for a declaratory judgment that they did not infringe upon another writer's copyright or trademark; they were countersued for portraying the defendant as a "goldigger." *Id.* at 849.

¹⁴³ See *Dun & Bradstreet*, 472 U.S. at 749.

¹⁴⁴ See *U.S. Med. Corp. v. M.D. Buyline, Inc.*, 753 F. Supp. 676, 679 (S.D. Ohio 1990) (Category I case).

¹⁴⁵ See *Bross v. Smith*, 608 N.E.2d 1175, 1180-81 (Ohio Ct. App. 1992) (Category VI case). The court also cited with approval *Falwell, Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724 (1st Cir. 1992) (Category I case), and *Church of Scientology. Bross*, 608 N.E.2d 1181-82.

¹⁴⁶ *Vail v. The Plain Dealer Pub. Co.*, 649 N.E.2d 182, 185 (Ohio 1995) (Category I case) (referring to *Milkovich*'s companion case, *Scott v. News-Herald*, 496 N.E.2d 699, 699 (Ohio 1996)).

separate and independent¹⁴⁷ guarantee of protection for opinion ancillary to freedom of the press.¹⁴⁸ It followed the four-factor *Ollman* test that had been adopted by *Scott*,¹⁴⁹ i.e. “[t]he specific language used, whether the statement is verifiable, the general context of the statement, and finally the broader context in which the statement appeared.”¹⁵⁰ Just recently, the Ohio Supreme Court in ruling that “[a] nonmedia defendant whose allegedly defamatory statements appear in a letter to the editor may invoke the same protection” as a media defendant,¹⁵¹ the court left no doubt as to its allegiance to the *Ollman / Scott / Vail* “opinion privilege” referred to in its earlier decision.¹⁵² In the interim, two Ohio Supreme Court decisions and one lower appellate court decision were handed down, but they did not change the Ohio opinion landscape.¹⁵³

¹⁴⁷ See *infra* note 150.

¹⁴⁸ See *Vail*, 649 N.E.2d at 185.

¹⁴⁹ See *Scott*, 496 N.E.2d at 706-07.

¹⁵⁰ *Vail*, 649 N.E.2d at 185. One judge on this court, Justice Pfeifer, concurring in the judgment only, disagreed with the majority opinion because in his view the Ohio Constitution is more restrictive of the rights of free speech than is the Federal Constitution. *Id.* at 188. He wrote: “we should adopt the federal standard enunciated in *Milkovich*. This court in *Scott* meant to bring Ohio in line with the federal law; but got lost along the way. The majority in this case squanders the opportunity to get back on track.” *Id.* at 189.

¹⁵¹ See *Wampler v. Higgins*, 752 N.E.2d 962, 982 (Ohio 2001) (Category VI case).

¹⁵² *Id.* at 977. The same judge who disagreed with the majority in *Vail*, dissented in this case. *Id.* at 982 (Pfeifer, J. dissenting).

¹⁵³ In *Complaint Against Harper*, 673 N.E.2d 1253, 1266-67 (Ohio 1996) (Category VIII case), the Ohio Supreme Court, citing *Milkovich*, wrote that “First Amendment protection does not adhere to statements of opinion that imply false assertions of fact.” In a companion suit (the plaintiff asked the U.S. District Court to restrain further disciplinary proceeding), the Seventh Circuit, in affirming a U.S. District Judge’s abstention, said that since under *Milkovich* “First Amendment protection does not adhere to statements that imply false assertions of fact,” a Canon of Professional Conduct prohibiting false advertising was not “flagrantly overbroad.” See *Harper v. Office of Disciplinary Counsel*, 113 F.3d 1234, *3 (7th Cir. 1997) (an unpublished opinion) (Category VIII case). In *McKimm v. Ohio Elections Comm.*, 729 N.E.2d 364, 369 (Ohio 2000) (Category VIII case), the court analogized federal and state systems in order to show that under both of these independent systems the “ordinary reader” test is used. See *Wampler*, 752 N.E.2d at 973. In *Ferreri v. The Plain Dealer Pub. Co.*, No. 77407, 2001 WL 492432 (Ohio Ct. App. May 3, 2001)

Rhode Island

The Rhode Island Supreme Court, as an additional reason for using its own case law in resolving a fact/opinion issue, said that “our own Rhode Island Constitution affords adequate and independent grounds for us to afford full constitutional protection’ to this type of communication”¹⁵⁴ a claimed defamation by a mortgage lender about a real estate appraisal being “inflated.”¹⁵⁵

Utah

The Utah Supreme Court opined that the common law privilege of “fair comment,” not discussed by *Milkovich*, remains viable as a defense in a defamation case.¹⁵⁶ A later decision of that court reiterated its approval of “fair comment” and held that because the Utah Constitution protects “expressions of opinion such as those at issue in this case,” the court made its determination without referring to First Amendment law as espoused by *Milkovich*.¹⁵⁷ A United States District Judge followed that Utah Supreme Court authority in establishing defamation, but utilized *Milkovich*’s verifiability test in resolving the opinion/fact controversy.¹⁵⁸

(Category II case), the Eighth District of the Ohio Court of Appeals discussed and used the rich hyperbole jurisprudence of *Milkovich*. *Id.* at *6.

¹⁵⁴ *Beattie v. Fleet Nat. Bank*, 746 A.2d 717, 724 (R.I. 2000) (Category VI case).

¹⁵⁵ The court added that “[i]t would appear that *Milkovich* has not affectively overruled our decision in *Belliveau* insofar as we adopted the Restatement’s position that an opinion is not defamatory if it is based upon disclosed, non defamatory facts.” *Id.* at 724 (referring to *Belliveau v. Rerick*, 504 A.2d 1360 (R.I. 1986)).

¹⁵⁶ *Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 903 (Utah 1992) (Category I case).

¹⁵⁷ *See West v. Thomson Newspapers*, 872 P.2d 999, 1021 (Utah 1994) (Category II case). Taking its cue from New York’s *Immuno* decision, the court wrote that “courts should decide cases on nonconstitutional grounds where possible, including common law or statutory grounds.” *Id.* at 1004. *See also id.* at 1005, 1007, 1016 (specifically referencing *Immuno*); *id.* at 1018-20 (approving the *Ollman* decision.).

¹⁵⁸ *See Computerized Thermal Imaging, Inc. v. Bloomberg*, No. 1:00CV98K, 2001 WL 670927, at * 2 (D. Utah Mar. 26, 2001) (Category I case).

Courts Which Use Other Authority to Decide the Fact/Opinion Issue

Some courts, rather than citing *Milkovich* as authority for a resolution of the issue of whether the statement in question is fact or opinion, cite different authority.

Colorado

A United States District Court Judge recognized that *Milkovich* “abandoned the fact/opinion terminology,” but nonetheless followed a 1983 Colorado case, *Burns v. McGraw-Hill Broad. Co.*,¹⁵⁹ for a three factor test to determine the fact/opinion controversy.¹⁶⁰ The Tenth Circuit, in a case emanating from Colorado, while recognizing *Milkovich*, used a Colorado Supreme Court decision,¹⁶¹ to structure a four-factor test.¹⁶²

District of Columbia

A District of Columbia Court of Appeal used pre-*Milkovich* standards to find that the “subject statements were sufficiently factual to preclude constitutional protection.”¹⁶³ A District Court Judge in the District of Columbia also used the “fair comment” defense.¹⁶⁴

Hawaii

During a trial in Hawaii that established an easement over property on Maui owned by George Harrison, the former “Beatle,” Harrison told a newspaper reporter that in the loss of his privacy he was being “raped” by those seeking the easement.¹⁶⁵ The Hawaii

¹⁵⁹ *Burns*, 659 P.2d at 1351.

¹⁶⁰ See *Gehl Group v. Koby*, 838 F. Supp. 1409, 1407 (D. Colo. 1993) (Category IV case).

¹⁶¹ *Living Will Center*, 879 P.2d at 1351.

¹⁶² See *Jefferson County School Dist. v. Moody’s Investor’s Services, Inc.*, 175 F.3d 848, 853 (10th Cir. 1999) (Category V case).

¹⁶³ See *Sigal Corp. v. Stanbury*, 586 A.2d 1204, 1210 (D.C. Ct. App. 1991) (Category VI case).

¹⁶⁴ See *Lane v. Random House, Inc.*, 985 F. Supp. 141, 150 (D.D.C. 1995) (Category II case).

¹⁶⁵ *Gold v. Harrison*, 962 P.2d 353, 361 (Haw. 1998) (Category IV case).

Supreme Court used three Ninth Circuit cases,¹⁶⁶ as well as *Milkovich*'s hyperbole factor¹⁶⁷ in finding that the word "raped" was an "imaginative expression [that] enlivens writers' prose and is protected by the first amendment."¹⁶⁸

Illinois

U.S. District Court judges in Illinois, while discussing *Milkovich*, have used Illinois authority,¹⁶⁹ and the *Ollman*¹⁷⁰ factors in resolving the fact/opinion dichotomy.¹⁷¹ The Seventh Circuit has discussed *Milkovich*, but has relied on the "substantial accuracy" defense in affirming a defendant's summary judgment.¹⁷²

Massachusetts

A state court judge in Massachusetts, finding that *Milkovich* did not alter state law, used a state case as authority.¹⁷³

Minnesota

A state court judge in Minnesota, upon finding that "Minnesota common law makes no distinction between 'fact' and 'opinion'" used a state case as authority.¹⁷⁴ Another state judge

¹⁶⁶ *Partington*, 56 F.3d 1147; *Fasi*, 114 F.3d 1194; *Unelko*, 912 F.2d 1049.

¹⁶⁷ See *infra* text accompanying notes 256-83.

¹⁶⁸ *Gold*, 962 P.2d at 361.

¹⁶⁹ *Hopewell v. Vitullo*, 701 N.E.2d 99, 103 (App. Ct. Ill. 1998) (Category VI case) (finding that the three factors were used by Illinois courts prior to *Milkovich*).

¹⁷⁰ See *supra* note 86.

¹⁷¹ See *Gosling v. Conagra, Inc.*, No. 95 C 6745, 1996 WL 199738, at *4 (N.D. Ill. April 23, 1996) (Category VI case); *Skolnich v. Correctional Med. Services, Inc.*, 132 F. Supp. 2d 1116, 1125 (N.D. Ill. 2001) (Category IV case).

¹⁷² See *Pope v. Chronicle Pub. Co.*, 95 F.3d 607, 615 (7th Cir. 1996) (Category I case).

¹⁷³ See *Lyons v. Globe Newspaper Co.*, 612 N.E.2d 1158, 1158-62 (Mass. 1993) (Category I case).

¹⁷⁴ See *Weissman v. Sri Lanka Curry House, Inc.*, 471, 473 (Minn. Ct. App. 1991) (Category VI case).

used a four-factor test proclaimed by a prior Minnesota case¹⁷⁵ in resolving the fact/opinion issue.¹⁷⁶

Missouri

The Eighth U.S. Circuit Court of Appeals, in a case emanating from Missouri, used a “hyperbole” factor in deciding a case before it, but cited a pre-*Milkovich* U.S. Supreme Court decision,¹⁷⁷ as authority.¹⁷⁸

Montana

The Supreme Court of Montana announced that in a prior case¹⁷⁹ it “melded” two of the *Milkovich* factors,¹⁸⁰ and hence the court used that decision in resolving whether an arrestee was defamed by being identified as a “fugitive,” “most wanted” and “armed and dangerous.”¹⁸¹

New Jersey

An intermediate appellate court of New Jersey, in apparently the first reported decision referring to *Milkovich*, refrained from attempting to decide whether the First Amendment protected the defendant, because it found that “our law as applied in this case is at least as protective of free speech as federal law would be.”¹⁸²

¹⁷⁵ *Huyen v. Driscoll*, 479 N.W.2d 76, 79 (Minn. Ct. App. 1992) (Category III case).

¹⁷⁶ *Dragisich v. Mesabi Daily News*, No. C4-92-1660, 1993 WL 19665, at * 1 n.1 (Minn. Ct. App. Jan. 26, 1993) (Category II case). However, the court said that its decision was made “under *Milkovich*,” and that it relied on the hyperbole factor. *Id.* at *2.

¹⁷⁷ *Letter Carriers*, 418 U.S. at 264.

¹⁷⁸ *Beverly Hills Foodland, Inc. v. United Food and Commercial Workers Union*, 39 F.3d 191, 195 (8th Cir. 1994) (Category VI case).

¹⁷⁹ *Roots v. Montana Human Rights Network*, 913 P.2d 638 (Mont. 1996) (Category IV case).

¹⁸⁰ The provability and hyperbole factors. In *Roots*, the court said that “[t]he First Amendment protects statements of opinion on matters of public concern when they do not contain a provable false factual connotation or, where they cannot reasonably be interpreted as stating facts about an individual.” *Id.* at 640.

¹⁸¹ See *Hale v. City of Billings*, 986 P.2d 413, 419 (Mont. 1999) (Category I case).

¹⁸² See *Cassidy v. Merin*, 582 A.2d 1039, 1048 (N.J. Super. Ct. App. Div. 1990) (Category III case).

New Mexico

The U.S. Tenth Circuit Court of Appeals, while recognizing that under *Milkovich* certain expressions of opinion “implicitly contain an assertion of objective fact, and such statements are not exempt from a defamation claim,” used New Mexico law in finding that a statement to the effect that the plaintiff was being sued for stock fraud was sufficiently factual to be susceptible of being found true or false.¹⁸³

Nevada

The Nevada Supreme Court, rather than cite *Milkovich* directly, cited other authority, which had used *Milkovich* as authority for its decision.¹⁸⁴

Rhode Island

The Rhode Island Supreme Court has stated that *Milkovich* did not overrule its own constitution and held that “an opinion is not defamatory if it is based upon disclosed, nondefamatory facts.”¹⁸⁵

Tennessee

Rather than using *Milkovich*, a Tennessee Court of Appeals has used other United States Supreme Court decisions.¹⁸⁶

The Courts Which Use Milkovich for Points Other than the Fact/Opinion Dichotomy

Some courts ignore the fact/opinion dichotomy emphasized by *Milkovich* and cite the case for some other proposition other courts cite the case, but do not clearly assign it or any other authority for their decision.

¹⁸³ *Schwartz v. American College of Emergency Physicians*, 215 F.3d 1140, 1145-46 (10th Cir. 2000) (Category III case).

¹⁸⁴ *See Wynn v. Smith*, 16 P.3d 424, 431 (Nev. 2001) (Category III case) (citing *Kovatovich v. K-Mart Corp.*, 88 F. Supp. 2d 975 (D. Minn. 1999)).

¹⁸⁵ *See Beattie v. Fleet Nat. Bank*, 746 A.2d 717, 724 (R.I. 2000).

¹⁸⁶ *See Moman v. M.M. Corp.*, No. 02A01-9608-CV00182, 1997 WL 167210, at *4 (Tenn. Ct. App. Apr. 10, 1997) (Category II case) (referring to *Hepps*, *Bresler*, *Austin*, *Falwell*, *Sullivan*, *Butts*, and *Gertz*) (citations omitted).

Alaska

The Alaska Supreme Court cited *Milkovich* in a Category VIII case in finding that even if the case were one for defamation, it would be barred by the First Amendment because that constitutional provision protects expressions of “ideas.”¹⁸⁷

Arkansas

The Eighth Circuit, reversing a plaintiff’s judgment in a defamation diversity case from Arkansas, relied almost entirely on the *St. Amant* doctrine,¹⁸⁸ writing that “[t]he evidence . . . does not clearly and convincingly show reckless awareness of probable falsity or actual belief in falsity.”¹⁸⁹ It mentioned *Milkovich* solely for the manner in which its decision compared with that doctrine.¹⁹⁰

Connecticut

The Connecticut Supreme Court used the *Sullivan* rule,¹⁹¹ to the effect that malice is a prerequisite to recovery by a public official for his/her being defamed, and *Milkovich* was cited for its recognition of that rule.¹⁹²

Illinois

An Illinois case cited *Milkovich* solely for its position on the standard of proof required in a defamation case.¹⁹³ In another

¹⁸⁷ See *Sands*, 34 P.2d at *4 n.20.

¹⁸⁸ See *St. Amant v. Thompson*, 390 U.S. 727 (1968).

¹⁸⁹ See *Campbell v. Citizens For Honest Gov’t*, 255 F.3d 560, 577 (8th Cir. 2001) (Category III case).

¹⁹⁰ *Id.* at 567. The court failed to mention state authority at all.

¹⁹¹ *New York Times v. Sullivan*, 376 U.S. 254 (1964).

¹⁹² See *Woodcock v. Journal Publishing Co., Inc.*, 646 A.2d 92, 97 (Conn. 1994) (Category II case). That same year Robert I. Berdon, an Associate Justice of the Connecticut Supreme Court, made a plea for more involvement of the Connecticut Constitution. He wrote: “we do have a state constitution - indeed, a magnificent state charter of liberty. We are just starting to clear the cobwebs off it and invoke its provisions. It has the potential of becoming a roaring lion for the protection of individual rights.” See Robert I. Berdon, *Commentary: Freedom of the Press and the Connecticut Constitution*, 26 CONN. L. REV. 659, 669 (1994).

¹⁹³ See *Rosner v. Field Enterprises, Inc.*, 564 N.E.2d 131, 157 (Ill. App. Ct. 1990) (Category I case).

defamation case from Illinois, the Seventh Circuit's only reference to *Milkovich* was to attribute to it the proposition that "forceful characterizations . . . are opinions rather than facts."¹⁹⁴ A United States District Judge, though discussing *Milkovich*, rendered a Rule 12(b)(6) dismissal on the ground that the allegedly defamatory statement was not damaging to the plaintiff in his reputation as a police officer.¹⁹⁵

Iowa

The Eighth Circuit cited *Milkovich* only in connection with a standard of review issue.¹⁹⁶ *Milkovich* was cited for some general principles of defamation law by a U.S. District Judge in a case brought by prisoners against their warden arising out of their being disciplined for grievances containing false or defamatory statements.¹⁹⁷

Maryland

A Maryland court cited *Milkovich* primarily in connection with the issue of the malice requirement when the plaintiff is a public official or public figure.¹⁹⁸

Michigan

A Michigan court cited *Milkovich* only for its position on standard of proof.¹⁹⁹ A United States District Judge in Michigan used *Milkovich* as authority for requiring the plaintiff to "show some level of fault."²⁰⁰

¹⁹⁴ See *Wilkow v. Forbes, Inc.*, 241 F.3d 552, 555 (7th Cir. 2001) (Category I case).

¹⁹⁵ *Silk v. City of Chicago*, No. 95 C 0143, 1996 WL 312074, at *30 (N.D. Ill. June 7, 1996) (Category III case).

¹⁹⁶ See *Lundell Mfg. Co., Inc. v. A.B.C.*, 98 F.3d 351, 358 (8th Cir. 1996) (Category I case).

¹⁹⁷ See *Hancock v. Thalacker*, 933 F. Supp. 1449, 1475, 1477 (N.D. Iowa 1996) (Category VIII case).

¹⁹⁸ See *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 708 (4th Cir. 1991) (Category I case).

¹⁹⁹ See *Faxcon v. Michigan Rep. State Centr. Comm.*, 624 N.W.2d 509, 512 (Ct. App. Mich. 2001) (Category III case).

²⁰⁰ *Johnson v. McGraw-Hill Cos.*, No. 97 CV70794-DT, 1998 WL 1083502, at * 2 (E.D. Mich. May 21 1998) (Category I case).

New Hampshire

The First Circuit, in a case emanating from New Hampshire, barely mentioned *Milkovich* in its discussion of the plaintiff's status as a limited purpose public figure.²⁰¹

Pennsylvania

The Commonwealth Court of Pennsylvania used Pennsylvania case law as authority for finding that a complaint stated a cause of action in defamation and failed to refer to any of the *Milkovich* factors.²⁰²

Texas

A Texas Court of Appeals cited *Milkovich* only for its proclamation that there is no wholesale privilege for opinion;²⁰³ another recognized only that *Milkovich* overturned the *Ollman* decision.²⁰⁴

West Virginia

A West Virginia court cited *Milkovich* solely in connection with the issue of the malice requirement when the plaintiff is a public official or public figure.²⁰⁵

²⁰¹ See *Faigin v. Kelly*, 184 F.3d 67, 76 n.3 (1st Cir. 1999) (Category IV case). See also Mark Gatto, *An Athlete's Statements Regarding the Conduct of His Agent Can be Actionable Under State Defamation Laws*, 9 SETON HALL J. SPORTS L. 263 (1999) (concerning the District Court decision in *Faigin v. Kelly*).

²⁰² See *Petula v. Mellody*, 588 A.2d 103 (Pa. Commw. Ct. 1991) (Category VI case) (citing *Gordon v. Lancaster Osteopathic Hosp. Ass'n., Inc.*, 489 A.2d 1364; *Corabi v. Curtis Publ'g Co.*, 273 A.2d 899; *Goralski v. Pizzimenti*, 540 A.2d 595; *Baker v. Lafayette*, 504 A.2d 247; *Beckman v. Dunn*, 419 A.2d 583).

²⁰³ See *Shearson Lehman Hutton, Inc. v. Tucker*, 806 S.W.2d 914, 920 (Tex. Ct. App. 1991) (Category VI case).

²⁰⁴ See *S & T Aircraft Accessories, Inc. v. Bonnington*, No. 03-98-00648-CV, 2000 WL 13104, at *6 (Tex. Ct. App. Jan. 6, 2000) (Category VI case).

²⁰⁵ See *Hinerman v. The Daily Gazette Co.*, 423 S.E.2d 560, 587 (W.Va. 1992) (Category II case).

Courts That Construct Their Own Reasons for Differentiating Fact From Opinion

A considerable number of courts, while referring to *Milkovich*, have seemingly ignored its three-factor test for differentiating fact from opinion, and instead construct their own factors or make up their own reasons for resolving the defamation issue before them.

California

The California Court of Appeals²⁰⁶ and a District Court from the Northern District of California²⁰⁷ have taken a cue from the California Supreme Court, which ascribed to a “totality” test in a case that predated *Milkovich*.²⁰⁸ The Ninth Circuit has opined that under *Milkovich*, when speech addresses a matter of public concern, the plaintiff must show that the statements were false and made with malice.²⁰⁹

Connecticut

A Connecticut Superior Court thought that the words “nuisance” and “frivolous” were not actionable because under *Milkovich* they are “personal comments about another’s conduct.”²¹⁰

Delaware

The Delaware Supreme Court mentioned *Milkovich* only once in resolving a fact/opinion issue. Rather than using *Milkovich*

²⁰⁶ *Kimura v. Superior Court*, 281 Cal. Rptr. 691, 695 (Cal. Ct. App. 1991) (Category IV case).

²⁰⁷ *Nicosia v. DeRooy*, 72 F. Supp. 2d 1093, 1101 (N.D. Cal. 1999) (Category IV case).

²⁰⁸ *Baker v. Los Angeles Herald Examiner*, 721 P.2d 87, 90 (Cal. 1986) (opining that a “totality test,” takes into consideration “broad context,” “specific context” and “provability”).

²⁰⁹ *See Metabolife Int’l, Inc. v. Wornich*, 264 F.3d 832, 840 (9th Cir. 2001) (Category I case).

²¹⁰ *See Mozzochi v. Hallas*, No. CV 950556163S, 1998 WL 19910, at *2 n.1 (Conn. Super. Ct. Jan. 6, 1998) (Category II case). This seems to conflict with *Weyrich v. New Republic, Inc.*, 235 F.3d 617 (D.C. Cir. 2001) (Category II case), *see infra* note 310.

to address the issue of whether the word “slumlord” was actionable, it found “a potentially defamatory basis imbedded in the statement” of how the plaintiff managed his properties which justified a denial of defendant’s motion to dismiss.²¹¹

District of Columbia

In 1984, prior to the Supreme Court’s decision in *Milkovich*, the District of Columbia Circuit held in *Ollman v. Evans*²¹² that in determining whether a statement is one of fact or non-actionable opinion, courts should look to the totality of the circumstances in which the statement is made. In order to do so the court should consider four factors.²¹³ Thus the “*Ollman*” factors appeared, and were used by a considerable number of courts.²¹⁴ After *Milkovich*, several courts abandoned the four *Ollman* factors,²¹⁵ but several courts still used them,²¹⁶ despite the

²¹¹ See *Ramunno v. Cawley*, 705 A.2d 1029, 1037 (Del. 1998) (Category I case).

²¹² 750 F.2d 970 (D.C.Cir. 1984).

²¹³ (1) the common usage or meaning of the specific language of the challenged statement; (2) the statement’s verifiability; (3) the full context of the statement; and (4) the broader context of the setting in which the statement appears. *Id.* at 979.

²¹⁴ The most important of these decisions were *Janklow*, 788 F.2d at 1300 and *Steinhilber*, 501 N.E.2d at 555, the latter of which figured so prominently in the development of New York law in this area; see *supra* text accompanying notes 119-42.

²¹⁵ See *Biospherics, Inc. v. Forbes, Inc.*, 151 F.3d 180, 184 (4th Cir. 1988) (Category I case); *Yetman v. English*, 811 P.2d 323, 327 (Ariz. 1991) (Category III case); *Lester v. Powers*, 596 A.2d 65, 71 n.9 (Me. 1991) (Category IV case) (stating that *Ollman*’s holding had been overruled by *Milkovich* as a statement of First Amendment law); *600 West 115th Street Corp.*, 589 N.Y.S.2d at 829; *Guilford Transp. Industries, Inc. v. Wilner*, 760 A.2d 580, 583 (D.C. Ct. App. 2000) (Category I case). At least one court, even prior to *Milkovich*, declined to follow *Ollman*. See *Costello v. Capital Cities Communications, Inc.*, 505 N.E.2d 701, 706 (Ill. App. Ct. 1987).

²¹⁶ See *Q Int’l Courier, Inc. v. Seagraves*, No. 95-1554, 1995 WL 1027034, at *5 (D.D.C. Feb. 26, 1999) (Category I case); *Gist v. Macon County Sheriff’s Dept.*, 671 N.E.2d 1154, 1157-58 (App. Ct. Ill. 1996) (Category IV case); *Moriarity v. Greene*, 732 N.E.2d 730, 739 (App. Ct. Ill. 2000) (Category I case); *Skolnick v. Correctional Med. Serv., Inc.*, 132 F. Supp. 2d 1116, 1125 (N.D. Ill. 2001) (Category IV case); *Henry v. National Ass’n of Air Traffic Specialists, Inc.*, 836 F. Supp. 1204, 1215-19 (D. Md. 1993) (Category VI case); *Gillette Co. v. Norelco Consumer Prod. Co.*, 946 F. Supp. 115, 137 (D. Mass. 1996)

fact that the Supreme Court in *Milkovich* adopted a three-factor test.

The first post-*Milkovich* case considered by the District of Columbia Circuit²¹⁷ involved defamation by implication.²¹⁸ Since the verity or falsity of what was said could be established, under *Milkovich* it was afforded no constitutional protection.²¹⁹ The court ruled in favor of the defendant because there was no evidence (under the doctrine of defamation by implication), that the media defendants intended a defamatory inference.²²⁰ A United States District Court, though mentioning *Milkovich*, used malice in deciding a defamation case.²²¹

Georgia

The only reported decision emanating from Georgia is a U.S. District Court case, which opined that *Milkovich* "set forth a two-pronged test to determine whether or not an opinion was entitled to protection."²²²

(Category VIII case); *In re Thompson*, 162 B.R. 748, 768-70 (Bankr. E.D. Mich. 1993) (Category VIII case), (determining dischargeability of debts (under 11 U.S.C. § 523(a)) could find no difference between *Ollman* and *Milkovich*); *Kimura*, 281 Cal. Rptr. at 694; *Diesen v. Hessburg*, 455 N.W.2d 446, 451 (Minn. 1990) (Category II case); *Immuno*, 567 N.E.2d at 910; *Wampler*, 752 S.W.2d at 968; *West*, 872 P.2d at 1017.

²¹⁷ See *White v. Fraternal Order of Police*, 909 F.2d 512 (D.C. Cir. 1990) (Category I case).

²¹⁸ See *supra* note 10.

²¹⁹ *White*, 909 F.2d at 523. This conclusion seems to overlook the obvious, that a statement of fact which was correct would have constitutional protection.

²²⁰ *Id.* at 526. The finding is curious because of what the court earlier stated: "[i]t is no defense that the defendant did not actually intend to convey the defamatory meaning, so long as the defamatory interpretation is a reasonable one." *Id.* at 519.

²²¹ See *Sculimbrene v. Reno*, 158 F. Supp. 2d 8, 18 (D.D.C. 2001) (Category VIII case), which was decided under the Ku Klux Klan Act, 42 U.S.C. § 1985 (1), (2), and opined that an opinion defense by a defendant will not stand.

²²² See *Brewer v. Purvis*, 816 F. Supp. 1560, 1580 (M.D. Ga. 1993) (Category VIII case) (stating: "First, this court must determine whether a reasonable fact finder could conclude that a statement implied a defamatory assertion . . . If the answer is 'yes,' then the district court must determine whether the defamatory assertion is factual enough to be proved true or false . . . If it cannot be proved true or false then the opinion is constitutionally protected.").

Hawaii

A United States District Court in Hawaii, though mentioning *Milkovich*, used malice in rendering a decision in a defamation case.²²³

Illinois

An Illinois Court of Appeal ascribed to a totality test,²²⁴ in addition to two other factors: “context” and “verifiability.”²²⁵

Massachusetts

The First Circuit, in an often cited case emanating in Massachusetts, thought that *Milkovich* proclaimed a four-factor test.²²⁶

Minnesota

United States District Courts in Minnesota believed that *Milkovich* established a “two-part test.”²²⁷ One court said that “a court must first determine whether a reasonable fact finder could conclude that a statement implied a defamatory assertion; and if so, the court must then determine whether the defamatory assertion is sufficiently factual to be susceptible of being proved true or false.”²²⁸ Another court said that “[f]irst, the statements must be provable as false . . . Second, the statements must reasonably be interpreted as stating actual facts about the individual.”²²⁹

²²³ See *Ancheta v. Watada*, 135 F. Supp. 2d 1114, 1122 (D. Haw. 2001) (Category III case).

²²⁴ See *Dubinsky v. United Airlines Master Executive Council*, 708 N.E.2d 441, 450-51 (App. Ct. Ill. 1999) (Category V case).

²²⁵ See *Bryson v. News America Pubs. Inc.*, 672 N.E.2d 1207 (Ill. 1996).

²²⁶ *Phantom Touring, Inc.*, 953 F.2d at 727. The four factors discussed by the court are: (a) provability, (b) could the statement be reasonable interpreted as stating actual facts, (c) examine the context in which the statement was made, and (d) refer to the “whole record.” The fourth factor the court referred to as “a safety valve determination.” *Id.*

²²⁷ See *Conroy v. Kilzer*, 789 F. Supp. 1457, 1461 (D. Minn. 1992) (Category II case); *LeDoux v. Northwest Pub., Inc.*, 521 N.W.2d 59 (Minn. Ct. App. 1994) (Category I case).

²²⁸ *Conroy*, 789 F. Supp. at 1461. The court noted that *Milkovich* does not establish a test for defamation by implication. *Id.* See *supra* discussion accompanying note 10, regarding defamation by implication.

²²⁹ *LeDoux*, 521 N.W.2d at 66.

Mississippi

The Mississippi Supreme Court has said that its court must look for the “reasonable interpretation of the declaration.”²³⁰

Nebraska

The Nebraska Supreme Court has adopted the “totality of circumstances” test.²³¹

Nevada

A United States District Court in Nevada has noted that a defendant “use[d] italics, and punctuation, such as question marks, to identify his personal thoughts and observations, thereby creating the impression that the statements are opinion and not assertions of objective fact.”²³²

New Mexico

In an action brought by a village council member against a newspaper for comments it made about him, the New Mexico Court of Appeals recognized a form of non-actionable expression which it called “political opinion.”²³³

²³⁰ See *Hamilton v. Hammonds*, 792 So. 2d 956, 961 (Miss. 2001) (Category IV case), in which alleged culprits in a shooting at a home sued the victim to recover damages for being defamed by his expression of opinion to a deputy sheriff and a newspaper reporter. They were held to be just that - non-actionable opinions. *Id.* This might be an embellishment on the “context” factor. See *Roussel v. Robbins*, 688 So. 2d 714, 723 (Miss. 1996) (Category VII case).

²³¹ See *Wheeler v. Nebraska State Bar Ass’n*, 508 N.W.2d 917, 921-22 (Neb. 1993) (Category III case) (following California’s *Baker v. Los Angeles Herald Examiner*, 721 P.2d 87 (Cal. 1986) decision as well as that of another California decision, which pre-dated *Milkovich* by 41 days, *Aisenson v. Am. Broad. Co.*, 269 Cal. Rptr. 379, 384 (Cal. Ct. App. 1990) (Category II case) which found that calling a judge a “bad guy” was “rhetorical hyperbole.”

²³² *Flowers v. Carville*, 112 F. Supp. 2d 1202, 1212 (D. Nev. 2000) (Category III case), in which Jennifer Flowers, who allegedly had an affair with President Bill Clinton brought an action against Hillary Rodham Clinton, for allegedly organizing a conspiracy to attack her. Joined in the action were political analyst James Carville, and former Press Secretary to the President, George Stephanopoulos, both of whom had written books about the affair.

²³³ *Andrews v. Stallings*, 892 P.2d 611, 619 (N.M. Ct. App. 1995) (Category II case). The court made its decision on the verifiability test of *Milkovich*. See *infra* text accompanying notes 312-50.

Oklahoma

The Oklahoma Supreme Court has used “fair comment” as a defense.²³⁴

Oregon

The Ninth Circuit, though referring to *Milkovich*, decided a defamation case on the basis of malice.²³⁵

South Dakota

Two years after the rendition of *Ollman*,²³⁶ the Eight Circuit, in a case emanating from South Dakota, decided *Janklow v. Newsweek, Inc.*,²³⁷ which slightly expanded upon the four *Ollman* factors.²³⁸ Several of the progeny²³⁹ and several non-

²³⁴ See *Gaylord Entertainment Co. v. Thompson*, 958 P.2d 128, 144 n.62 (Okla. 1998) (Category I case).

²³⁵ *Fender v. City of Oregon City*, No. 93-35060, 1994 WL 534550, at *6 (9th Cir. 1994), (an unpublished decision) (Category III case). A former city manager sued a city and its mayor for defamation and retaliatory constructive discharge and violation of his First Amendment right to free speech.

²³⁶ *Ollman*, 750 F.2d at 970.

²³⁷ 788 F.2d 1300 (8th Cir. 1986).

²³⁸ *Id.* at 1302-03; see also *supra* note 87.

²³⁹ See *Hunt v. Univ. of Minnesota*, 465 N.W.2d 88, 94 (Minn. Ct. App. 1991) (Category VI case); *Lund v. Chicago & Northwestern Transp. Co.*, 467 N.W.2d 366, 369 (Minn. Ct. App. 1991) (Category VI case); and *Huyen*, 479 N.W.2d at 80. The same judge authored the opinions in *Hunt* and *Huyen*. *Hunt* developed a four factor test, which was a slight variation of the *Janklow* test and it was followed in several cases. See *McGrath v. TCF Bank Sav., F.S.B.*, 502 N.W.2d 801, 808 (Minn. Ct. App. 1993) (Category VI case); and *Geraci v. Eckankar*, 526 N.W.2d 391, 397 (Minn. Ct. App. 1995) (Category VI case); *Stokes v. CBS, Inc.*, 25 F. Supp. 2d 992, 997-1001 (D. Minn. 1998) (Category I case); *McClure v. Am. Family Mut. Ins. Co.*, 223 F.3d 845, 1054 (8th Cir. 2000) (Category VI case); *Lundell Mfg. Co.*, 98 F.3d at 360; *NBC Subsidiary*, 879 P.2d at 9; *Dragisich*, 1993 WL 19665, at *1; *Diesen*, 437 N.W.2d at 711; *Rappaport*, 618 N.Y.S.2d at 749; *Colon v. Town of West Hartford*, No. Civ. 3:00CV168 (AHN), 2001 WL 45464, at *4 (D. Conn. Jan. 5, 2001) (Category I case); *Coles v. Washington Free Weekly, Inc.*, 881 F. Supp. 26, 33 (D.D.C. 1995) (Category I case); *Mercer v. City of Cedar Rapids*, 129 F. Supp. 2d 1226, 1237 (N.D. Iowa 2001) (Category III case); *French v. Eagle Nursing Home, Inc.*, 973 F. Supp. 870, 884 (D. Minn. 1997) (Category VIII case); *Morningstar v. Superior Court*, 29 Cal. Rptr. 2d 547, 556 (Cal. Ct. App. 1994) (Category I case); *Woodcock*, 646 A.2d at 1000; *Lizotte v. Walker*, 709 A.2d 50, 59 (Conn. Super Ct. 1996) (Category I case); *Martin v. Widener Univ. School of Law*, 1992 WL 153540, at

progeny²⁴⁰ have cited *Janklow* with approval, despite the fact that the Eighth Circuit rejected it in a case emanating from Minnesota.²⁴¹

Utah

The Utah Supreme Court has used “fair comment” as a defense.²⁴²

Wyoming

The Wyoming Supreme Court has used “fair comment” as a defense.²⁴³

The Courts Which Use the Three Milkovich Factors

The Ninth Circuit used all three of the *Milkovich* factors for differentiating fact from opinion,²⁴⁴ but subsequently said that it

*28 (Del. Super. Ct. 1992) (Category II case); *Gist*, 671 N.E.2d at 1157; *LeDoux*, 521 N.W.2d at 66; *Weissman*, 469 N.W.2d at 472; *Andrews*, 892 P.2d at 616; and 909 F.2d at 520.

²⁴⁰ See *Janklow*, 459 N.W.2d at 415. This case was overruled nine years later, because of the *Milkovich* decision. See *Paint Brush Corp. v. Neu*, 599 N.W.2d 384, 396 (S.D. 1999) (Category VI case) (quoting directly from *Milkovich*, the court said that “[t]he dispositive question in the present case then becomes whether a reasonable factfinder could conclude that the statements in the warning letter imply a false assertion of objective fact.”). Other cases which did not mention *Milkovich*, but which applied *Janklow* are: *George v. Int’l Soc. for Krishna Consciousness*, 4 Cal. Rptr. 2d 473, 503 (Cal. Ct. App. 1992); *Sparagon v. Native Am. Pub., Inc.* 542 N.W.2d 125, 134 (S.D. 1996); *Torgerson v. Journal Sentinel, Inc.*, 546 N.W.2d 886, 886 (Wis. Ct. App. 1996) (an unpublished opinion); *Clements v. WHDH-TV, Inc.*, No. WC97-012, 1998 WL 596759, at *2 (R.I. Aug. 27, 1998); *Konikoff v. Prudential Ins. Co. of Am.*, No. 99-355, 1999 WL 688469, at *28 (S.D.N.Y. Oct. 18, 1999); *Chang v. Cargill, Inc.*, 168 F. Supp. 2d 1003, 1013 (D. Minn. 2001).

²⁴¹ See *Toney v. WCCO Television*, 85 F.3d 383, 394 (8th Cir. 1996) (Category I case). Subsequent thereto, the Eighth Circuit in *McClure*, 223 F.3d at 855, acknowledged that Minnesota courts follow *Janklow*.

²⁴² See *Russell*, 842 P.2d at 903; *West*, 872 P.2d at 102.

²⁴³ See *Spence v. Flynt*, 816 P.2d 771, 775-76 (Wyo. 1991) (Category II case); see also Thomas J. Tracy, *Thou Shalt Not Use His Name in Vain - The Misapplication of Milkovich v. Lorain Journal: Spence v. Flynt*, 26 CREIGHTON L. REV. 1221 (1993).

²⁴⁴ See *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1053 (9th Cir 1990) (Category I case). This case was not mentioned by a U.S. District Judge in

developed the test.²⁴⁵ U.S. District judges in Illinois,²⁴⁶ Maryland,²⁴⁷ Missouri,²⁴⁸ Nevada,²⁴⁹ South Carolina,²⁵⁰ and Virginia²⁵¹ have utilized all three *Milkovich* factors in rendering their decisions. The Supreme Court of Wyoming has used all three *Milkovich* factors,²⁵² as has a trial court in California.²⁵³

Some courts use none of *Milkovich*'s factors, but merely assign the case as authority for the proposition that "[a] statement is actionable unless it cannot be reasonably interpreted as stating actual facts."²⁵⁴

*The Courts Which Use the Hyperbole Factor of Milkovich*²⁵⁵

Courts in Alabama,²⁵⁶ Arizona,²⁵⁷ California,²⁵⁸ Colorado,²⁵⁹ Connecticut,²⁶⁰ the District of Columbia,²⁶¹ Florida,²⁶²

Arizona, but was followed in a subsequent version of the same case. See *Lexecon, Inc. v. Milberg, Weiss Bershad & Lerach*, 845 F. Supp. 1377, 1388 (D. Ariz. 1993) (Category IV case).

²⁴⁵ *Partington v. Bugliosi*, 56 F.3d 1147, 1153 (9th Cir. 1995) (Category I case). The test used is practically indistinguishable from the *Milkovich* test. The court used the three factor test again in *Fasi v. Gannett Co.*, No. 96-15129, 1997 WL 285939, at *1 (9th Cir. May 27, 1997) (unpublished opinion) (Category II case).

²⁴⁶ *Hopewell*, 701 N.E.2d at 103.

²⁴⁷ *Lapkoff*, 969 F.2d at 81.

²⁴⁸ *Klein v. Victor*, 903 F. Supp. 1327, 1332-34 (E.D. Mo. 1995) (Category I case).

²⁴⁹ *Flowers*, 112 F. Supp. 2d at 1211 (citing *Partington*, 56 F.3d at 1153 however, as its authority).

²⁵⁰ *Faltas v. State Newspaper*, 928 F. Supp. 637, 646-49 (D.S.C. 1996) (Category I case) (alluding also to the *Milkovich* verifiability test).

²⁵¹ See *Jenkins v. Snyder*, No. 00CV 2150, 2001 WL 755818, at *3 (E.D. Va. Feb. 6, 2001) (Category IV case) (using state law to establish defamation).

²⁵² See *Dworkin v. L.F.P., Inc.* 839 P.2d 903, 914-16 (Wyo. 1992) (Category II case).

²⁵³ See *Barrett v. Clark*, No. 833021-5, 2001 WL 881259, at *6 (Cal. Super. Ct. July 25, 2001) (Category IV case).

²⁵⁴ See *Arlington Financial Corp. v. Ben Franklin Bank of Ill.*, No. 98 C 7086, 1999 WL 89567, at *7 (N.D. Ill. Feb. 16, 1999) (Category VIII case).

²⁵⁵ Some courts use more than one factor, as well as state authority, hence their cases may be listed under several categories.

²⁵⁶ See *Deutsch v. Birmingham Post Co.*, 603 So. 2d 910, 912 (Ala. 1992) (Category II case); *Sanders v. Smitherman*, 776 So. 2d 68, 75 (Ala. 2000) (Category III case).

Hawaii,²⁶³ Kansas,²⁶⁴ Maine,²⁶⁵ Maryland,²⁶⁶ Massachusetts,²⁶⁷
 Michigan,²⁶⁸ Minnesota,²⁶⁹ Missouri,²⁷⁰ Nevada,²⁷¹ New Jersey,²⁷²
 New York,²⁷³ Pennsylvania,²⁷⁴ Tennessee²⁷⁵ Texas,²⁷⁶

²⁵⁷ Yetman v. English, 811 P.2d 323, 332 (Ariz. 1991).

²⁵⁸ Winter v. DC Comics, No. B121021, 2000 WL 1225798 (Cal. Ct. App. Aug. 25, 2000) (Category II case); Moyer v. Amador Valley J. Union High School Dist., 275 Cal. Rptr. 494, 497 (Cal. Ct. App. 1990) (Category IV case); Rosenaur v. Scherer, 105 Cal. Rptr. 2d 674, 677 (Cal. Ct. App. 2001) (Category IV case); Lam v. Ngo, 91 Cal. App. 4th 832, 849 (Cal. Ct. App. 2001) (Category III case); Standing Committee v. Yagman, 55 F.3d 1430, 1437-43 (9th Cir. 1995) (Category VIII case); Gilbrook v. City of Westminster, 177 F.3d 839, 882-83 (9th Cir. 1999) (Category IV case); Bidart v. Huber, No. CV-99-08666, 2001 WL 577002, at *2 (9th Cir. May 29, 2001) (Category IV case).

²⁵⁹ Hannon, 1991 WL 237874, at *2; *NBC Subsidiary*, 879 P.2d at 12; and *Keohane*, 882 P.2d at 1300.

²⁶⁰ Colon, 2001 WL 45464, at *5.

²⁶¹ Lane, 985 F. Supp. at 150-52; *Novecon, Ltd. v. Bulgarian Am. Enter. Fund*, 977 F. Supp. 45, 49 (D.D.C. 1997) (Category IV case) (referring to the hyperbole as "poetic license").

²⁶² Pullam v. Jackson, 647 So. 2d 254, 258 (Fla. Dist. Ct. App. 1994) (Category II case).

²⁶³ Gold, 962 P.2d at 361; *Partington*, 56 F.3d at 1157.

²⁶⁴ Woodmont Corp. v. Rockwood Ctr. P'ship, 811 F. Supp. 1478, 1480 (D. Kan. 1993) (Category VI case).

²⁶⁵ Levinsky's, Inc. v. Wal-Mart Stores, Inc., 127 F.3d 122, 127-28 (1st Cir. 1997) (Category IV case); *Veilleux v. N.B.C.*, 206 F.3d 99, 115 (1st Cir. 2000) (Category I case).

²⁶⁶ Batson v. Shiflet, 602 A.2d 1191, 1212 (Md. 1992) (Category I case).

²⁶⁷ Furst v. Tabloid Communications, Inc., Civ. A No. 94-1262, 1995 WL 324729, at *1 (Super. Ct. Mass. Feb. 7, 1995) (Category I case).

²⁶⁸ *In re Chmura*, 626 N.W.2d 876, 886 (Mich. 2001) (Category VIII case); *Royal Palace Homes, Inc. v. Channel 7 of Detroit*, Nos. 88-830089CZ, 1994 WL 413394, at *5 (Mich. Cir. Ct. Jan. 4, 1994) (Category I case).

²⁶⁹ *Dragisich*, 1993 WL 19665, at *2; *Hunter v. Hartman*, 545 N.W.2d 699, 706 (Minn. Ct. App. 1996) (Category I case); *Johnson v. C.B.S.*, 10 F. Supp. 2d 1071, 1078 (D. Minn. 1998) (Category I case).

²⁷⁰ *Nazeri v. Missouri Valley Coll.*, 860 S.W.2d 303, 314 (Mo. 1993) (Category VI case); *Shepard v. Courtoise*, 115 F. Supp. 2d 1142, 1147 (E.D. Mo. 2000) (Category VI case).

²⁷¹ *Wellman v. Fox*, 825 P.2d 208, 211 (Nev. 1992) (Category VI case) (referring to the test as "exaggeration or overbroad generalization").

²⁷² *Lynch v. New Jersey Educ. Ass'n*, 735 A.2d 1129, 1136 (N.J. 1999) (Category III case) (finding that "[r]eaders know that statements by one side in a political contest are often exaggerated, emotional, and even misleading.").

Washington,²⁷⁷ West Virginia,²⁷⁸ Wisconsin,²⁷⁹ and Wyoming²⁸⁰ have used the hyperbole factor of *Milkovich*.

On April 16, 1996 Oprah Winfrey's television show discussed the Mad Cow disease. After one of her guests stated that "Mad Cow Disease could make AIDS look like the common cold," Ms. Winfrey exclaimed that she was "stopped cold from eating another burger." The Texas Beef Group sued her and several other persons connected with the show.²⁸¹ Though the court observed that "[w]hen Ms. Winfrey speaks, America listens," her statements were not even claimed to be actionable. The guest's statement was hyperbolic.²⁸²

Courts Which Use the "Context" or "Tenor" Factor of Milkovich²⁸³

The second *Milkovich* factor is the "context" or "tenor" of the statement. Courts in Arizona,²⁸⁴ Arkansas,²⁸⁵ California,²⁸⁶

²⁷³ *Cytac Corp.*, 12 F. Supp. at 302; *Belly Basics, Inc. v. Mothers Work, Inc.*, 95 F. Supp. 2d 144, 146 (S.D.N.Y. 2000); *Gross*, 603 N.Y.S.2d at 817.

²⁷⁴ *MacElree v. Philadelphia Newspaper, Inc.*, 650 A.2d 1068, 1071 (Pa. Super. Ct. 1995) (Category II case) (referring to hyperbole as "metaphor").

²⁷⁵ *Stilts v. Globe Intern., Inc.*, 950 F. Supp. 220, 223-26 (M.D. Tenn. 1995) (Category I case).

²⁷⁶ *J.H. Hubbard v. Davis*, No. 14-99-00197-CV, 2000 WL 1125554 (Tex. Ct. App. Aug. 10, 2000) (Category VI case); *Texas Beef Group v. Winfrey*, 201 F.3d 680 (5th Cir. 2000) (Category VIII case) (decided under Texas' False Disparagement of Perishable Food Products Act).

²⁷⁷ *Haueter v. Cowles Pub. Co.*, 811 P.2d 231, 239 (Wash. Ct. App. 1991) (Category I case).

²⁷⁸ *Maynard v. Daily Gazette Co.*, 447 S.E.2d 293, 296, 299 (W.Va. 1994) (Category I case); *Hupp v. Sasser*, 490 S.E.2d 880, 886-88 (W.Va. 1997) (Category VI case).

²⁷⁹ *Kaminske v. Wisconsin Cent., Ltd.*, 102 F. Supp. 2d 1066, 1082 (E.D. Wis. 2000) (Category VI case); *Dilworth v. Dudley*, 75 F.3d 307, 309 (7th Cir. 1996) (Category III case) (opining that one academic's reference to another as a "crank" is just hyperbole).

²⁸⁰ *Spence*, 816 P.2d at 774.

²⁸¹ *Winfrey*, 201 F.3d at 688.

²⁸² *Id.*

²⁸³ Some courts use more than one factor, as well as state authority, hence their cases may be listed under several categories.

²⁸⁴ *Unelko*, 912 F.2d at 1053-55.

Connecticut,²⁸⁷ Colorado,²⁸⁸ the District of Columbia,²⁸⁹
 Florida,²⁹⁰ Hawaii,²⁹¹ Illinois,²⁹² Iowa,²⁹³ Kansas,²⁹⁴ Maryland,²⁹⁵
 Massachusetts,²⁹⁶ Michigan,²⁹⁷ Minnesota,²⁹⁸ Mississippi,²⁹⁹

²⁸⁵ *Dodson v. Dicker*, 812 S.W.2d 97, 112 (Ark. 1991) (Category IV case) (describing “tenor” as the “general drift” of the statement).

²⁸⁶ *Weller v. American Broad. Cos.*, 283 Cal. Rptr. 644, 654 (Cal. Ct. App. 1994) (Category I case); *Rosenaur*, 105 Cal. Rptr. 2d at 677; *Snider v. National Audubon Soc’y, Inc.*, No. CV-F-91-665 REC, 1992 WL 182186, at *3 (E.D. Cal. Apr. 14, 1992) (Category IV case) (finding that *Milkovich* did not substantially change California law, and holding that since the “content and context” of the publication could not reasonably be understood as assertions of fact it was not actionable); *Nicosia*, 72 F. Supp. 2d at 1101-02; *Gilbrook*, 177 F.3d at 863; *Hall*, 285 Cal. Rptr. at 819-20; *Cochran, v. NYP Holding, Inc.*, 210 F.3d 1036, 1038. (9th Cir. 2001) (Category II case).

²⁸⁷ *Colon*, 2001 WL 45464, at *5; *Lizotte*, 709 A.2d at 55, 58, 60.

²⁸⁸ *NBC Subsidiary*, 879 P.2d at 8.

²⁸⁹ *Guilford Transp. Industries, Inc. v. Wilner*, 760 A.2d 580, 599 (D.C. 2000); *Coles*, 881 F. Supp. at 32; *Moldea v. New York Times Co.*, 22 F.3d 310-12 (D.C. Cir. 1994) (Category II case); *Weyrich*, 235 F.3d at 620-25. See John Hershey, *If You Can’t Say Something Nice, Can You Say Anything at All?*, 67 U. COLO. L. REV. 705, 724 (1996) (observing that “[i]f context is not considered, nearly any statement of opinion could be made to seem verifiable.”).

²⁹⁰ *Florida Med. Ctr., Inc. v. New York Post, Inc.*, 568 So. 2d 454, 459 (Fla. Dist. Ct. App. 1990) (Category I case); *Pullam*, 647 So. 2d at 258; *Colodny v. Iverson, Yoakum, Papiano & Hatch*, 936 F. Supp. 917, 924 (M.D. Fla. 1996) (Category III case).

²⁹¹ *Partington*, 56 F.3d at 1155; *Fasi*, 1997 WL 285939, at *1.

²⁹² *Bryson*, 672 N.E.2d at 1220 (referring to context as “clear impact”) (Category I case); *Kolegas v. Heftel Broad. Corp.*, 607 N.E.2d 201, 303 (Ill. 1992) (Category I case); *Kumaran v. Brotman*, 617 N.E.2d 191, 228 (Ill. App. Ct. 1993) (Category I case) (referring to context as “gist”); *Dubinsky*, 708 N.E.2d at 450; *Gosling*, 1996 WL 199738, at *3; *Silk*, 1996 WL 312074, at *35.

²⁹³ *Mercer*, 129 F. Supp. at 1237.

²⁹⁴ *Hayhurst v. Beyrle*, No. 95-3335, 1996 WL 346595, at *1 (10th Cir. June 25, 1996) (unpublished opinion) (Category VI case).

²⁹⁵ *Lapkoff*, 969 F.2d at 81; *Biospherics, Inc.*, 171 F.3d at 184.

²⁹⁶ *Dulgarian v. Stone*, 652 N.E.2d 603, 607 (Mass. 1995) (Category I case); *Brown v. Hearst Corp.*, 862 F. Supp. 622, 628 (D. Mass. 1994) (Category I case).

²⁹⁷ *Kevorkian v. American Med. Ass’n*, 602 N.W.2d 233, 239 (Mich. Ct. App. 1999) (Category III case).

²⁹⁸ *Hunter*, 545 N.W.2d at 706; *Kovatovich v. K-Mart Corp.*, 88 F. Supp. 2d 975, 990 (D. Minn. 1999) (Category VIII case).

²⁹⁹ *Roussel*, 688 So. 2d at 723 (referring to context as “substance or gist”).

Missouri,³⁰⁰ New Hampshire,³⁰¹ New Mexico,³⁰² New York,³⁰³ Ohio,³⁰⁴ Oklahoma,³⁰⁵ South Carolina,³⁰⁶ Tennessee,³⁰⁷ Washington,³⁰⁸ and Wisconsin³⁰⁹ have used the “context” factor. At times “context” is used to find or reject other factors.³¹⁰

*The Courts Which Use the “Verifiability” Factor of Milkovich*³¹¹

At times the courts disguise the “verifiability” (or “provability”), test of *Milkovich*, by proclaiming that the statement in question “cannot reasonably be understood as stating actual facts about” the plaintiff or that they were “subjective impressions, unprovable as false.”³¹²

³⁰⁰ *Beverly Hills Foodland, Inc.*, 39 F.3d at 1194, 1196.

³⁰¹ *Douglas v. Pratt*, No. CIV. 98-416-M, 2000 WL 1513712, at *5 (D.N.H. Sept. 29, 2000) (Category II case).

³⁰² *Moore v. Sun Publ’g Corp.*, 881 P.2d 735, 742 (N.M. Ct. App. 1994) (Category I case).

³⁰³ *Flamm*, 201 F.3d at 153-55; *Belly Basics, Inc.*, 95 F. Supp. 2d at 145.

³⁰⁴ *Bross*, 608 N.E.2d at 1181-82.

³⁰⁵ *Melton v. City of Oklahoma City*, 928 F.2d 920, 929 (10th Cir. 1991) (Category VIII case).

³⁰⁶ *Goodwin v. Kennedy*, 552 S.E.2d 319, 323 (S.C. Ct. App. 2001) (Category VI case).

³⁰⁷ *Stilts*, 950 F. Supp. at 223-26 (referring to context as “gist or substance”).

³⁰⁸ *Haueter*, 811 P.2d at 238 (referring to “context” as “gist”).

³⁰⁹ *Kaminske*, 102 F. Supp. 2d at 1081.

³¹⁰ See *Guilford Transp. Indus.*, 760 A.2d at 599 (referring to the “context” of the statement to find hyperbole and non-verifiability). In *Weyrich*, 235 F.3d at 627, the court, using *Milkovich*’s context factor found that the use of “paranoia” was simply hyperbolic, but that even when used in a political context such comments as the plaintiff’s having frothed at the mouth and being unfit for marriage, could not be protected. This seems to conflict with the ruling of a Connecticut court discussed *supra* in text accompanying note 211. In *Garrett v. Tandy Corp.*, 295 F.3d 94 (1st Cir. 2002) (Category VI case), the court opined that “without additional contextual trappings” the District Court could not grant a Rule 12(b)(6) motion. *Id.* at 105.

³¹¹ Some courts use more than one factor, as well as state authority; hence their cases may be listed under several categories.

³¹² See *Turner v. Devine*, 848 P.2d 286, 294 (Ariz. 1993) (Category III case). M. Eric Eversole has taken the position that more courts use the “context” factor than the “verifiability” factor. See M. Eric Eversole, *Eight Years After Milkovich: Applying a Constitutional Privilege for Opinions Under the Wrong Constitution*, 31 IND. L. REV. 1107, 1120 (1998). It is my opinion that this study shows the opposite to be true. See also Martin F. Hansen, *Fact, Opinion*,

Some courts have used a “reasonable factfinder” test – looking to “whether a reasonable factfinder could conclude that the statement implies an assertion of objective fact.”³¹³ The Mississippi Supreme Court, in a slight variation of the “reasonable factfinder” inquiry³¹⁴ required its courts to inquire whether the “substance or gist” of an alleged defamatory statement “could reasonably be interpreted as declaring or implying an assertion of fact” rather than an expression of opinion.³¹⁵ A U.S. District Judge in Nevada refused to dismiss a complaint because under *Milkovich* “the statements may still imply a false assertion of fact.”³¹⁶

Most of the cases, however, simply proclaim that they are following the verifiability (or provability) test. Courts in Alabama,³¹⁷ Arizona,³¹⁸ California,³¹⁹ Colorado,³²⁰ the District of

and Consensus: The Verifiability of Allegedly Defamatory Speech, 62 GEO. WASH. L. REV. 43, 99 (1993). Martin F. Hansen opines that “although the Court correctly established verifiability as the yardstick against which to evaluate whether an allegedly defamatory statement is entitled to First Amendment protection, the Court’s analysis mistakenly assumed that statements stand in an unchanging relation to a given set of verifiability criteria.” *Id.*

³¹³ In those cases the courts say something to the effect that the threshold question is “whether a reasonable factfinder could conclude that the statement implies an assertion of objective fact.” See *Izuzu Motors, Ltd. v. Consumers Union of U.S.*, 66 F. Supp. 2d 1117, 1126 (C.D. Cal. 1999) (Category III case); see also *Nazeri*, 860 S.W.2d at 314, *Overcast v. Billings Mut. Ins. Co.*, 11 S.W.2d 62, 73 (Mo. 2000), a Category VI case; *Moore*, 881 P.2d at 742; see *supra* note 303.

³¹⁴ See *supra* note and text accompanying note 79.

³¹⁵ See *Roussel*, 688 So. 2d at 723.

³¹⁶ See *Riggs v. Clark County School Dist.*, 19 F. Supp. 2d 1177, 1184 n.7 (D. Nev. 1998).

³¹⁷ See *Marshall v. Plantz*, 13 F. Supp. 2d 1246, 1257 (M.D. Ala. 1998) (Category VI case).

³¹⁸ *Lexcon v. Milberg Weiss*, 884 F. Supp. 1388, 1396 n.13 (D. Ariz. 1995) (Category IV case).

³¹⁹ See *Ward v. News Group Newspapers, Ltd.*, No. CV-88-3340-JMI(TX), 1990 WL 256836, at *3 (C.D. Cal. Aug. 27, 1990) (Category I case) (“[T]hese opinions are not factually provable and thus, not actionable”); *Weller*, 283 Cal. Rptr. at 654; *Moyer*, 275 Cal. Rptr. at 497; *Gill v. Hughes*, 278 Cal. Rptr. 306, 311 (Cal. Ct. App. 1991) (Category IV case); *Bidart*, 2001 WL 577009, at *2; *Morningstar*, 29 Cal. Rptr. 2d at 557-58; *Kahn v. Bower*, 284 Cal. Rptr. 244, 250 (Cal. Ct. App. 1991) (Category III case); *James v. San Jose Mercury News, Inc.*, 20 Cal. Rptr. 2d 890, 897 (Cal. Ct. App. 1993) (Category II case); *Songer v. Dake*, No. A083830, 1999 WL 603796, at *3 (Cal. Ct. App. July 29, 1999)

Columbia,³²¹ Illinois,³²² Iowa,³²³ Kansas,³²⁴ Maine,³²⁵ Louisiana,³²⁶ Maryland,³²⁷ Michigan,³²⁸ Minnesota,³²⁹ Missouri,³³⁰ Nevada,³³¹

(Category VI case); *Ferlauto v. Hamsher*, 88 Cal. Rptr. 2d 843, 849 (Cal. Ct. App. 1999) (Category VI case); *Sagan v. Apple Computer, Inc.*, 874 F. Supp. 1072, 1076 (C.D. Cal. 1993) (Category III case); *Nicosia*, 72 F. Supp. 2d at 1101; *Yagman*, 55 F.3d at 1437-43; *Vondran v. McLinn*, No. C 95-20296 RPA, 1995 WL 415153, at *6 (N.D. Cal. July 5, 1995) (Category VIII case) (stating that the First Amendment does not protect "statements based on objectively verifiable facts"); *Underwager v. Channel 9 Australia*, 69 F.3d 361, 367 (9th Cir. 1995) (Category II case) (referring to the statement as "lustly and imaginative expression"); *Conkle v. Jeong*, 73 F.3d 909, 917 (9th Cir. 1995) (Category VI case); *Caine v. Duke Communications Int'l*, No. CV-95-0792 JMI(MCX), 1995 WL 608523, at *2 (C.D. Cal. Oct. 3, 1995) (Category IV case) (stating that "[i]n order to recover on a tort theory based upon a publication's communicative impact, the matter must involve a statement of fact, not pure opinion"); *County of Orange (In Re County of Orange) v. McGraw-Hill Cos.*, 245 B.R. 138, 147 (C.D. Cal. 1997) (Category VIII case) (stating that "the Supreme Court rejected a bright line division between defamation actions based on false statements of fact and those based on statements of opinion"); *Films of Distinction, Inc. v. Allegro Film Productions, Inc.*, 12 F. Supp. 2d 1068, 1080 (C.D. Cal. 1998) (Category VIII case) ("Statements of opinion on matters of public concern that do not contain or imply a provable factual assertion are constitutionally protected"); *Dodds v. Am. Broad. Co.*, 145 F.3d 1053, 1066 (9th Cir. 1998) (Category II case); *Gilbrook*, 177 F.3d at 863; *Cochran v. NYP Holdings, Inc.*, 210 F.3d 1036, 1038 (9th Cir. 2000) (Category II case); *Papadopoulos v. Arturo Salice S.p.A.*, No. 98-56776, 2000 WL 1058944, at *3 (9th Cir. Aug. 1, 2000) (Category VI case); *Metabolife*, 264 F.3d at 840; *Hall*, 285 Cal. Rptr. at 820.

³²⁰ *Hannon*, 1991 WL 23787, at *2; *Keohane*, 882 P.2d at 1299.

³²¹ *Foretich v. Glamour*, 753 F. Supp. 955, 960 (D.D.C. 1990) (Category I case); *Coles*, 881 F. Supp. at 32; *Q Int'l Courier*, 1995 WL 1027034, at *7; *White*, 909 F.2d at 523; *Washington v. Smith*, 80 F.3d 555, 557 (D.C. Cir. 1996) (Category I case).

³²² *Bryson*, 672 N.E.2d at 1220; *Piersall v. Sports Vision of Chicago*, 595 N.E.2d 103, 107 (Ill. App. Ct. 1992) (Category II case); *Aroonsakul v. Shannon*, 664 N.E.2d 1094, 1100 (Ill. App. Ct. 1996) (Category IV case); *Dubinsky*, 708 N.E.2d at 448; *Moriarity*, 732 N.E.2d at 739; *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227-28 (7th Cir. 1993) (Category I case) (adding that the statements "probably would be non-actionable in any event as obvious statements of opinion"); *Sullivan v. Conway*, 157 F.3d 1092, 1098 (7th Cir. 1998) (Category VI case); *Scheidler v. National Org. for Women, Inc.*, 751 F. Supp. 743, 745-46 (N.D. Ill. 1990) (Category IV case); *Boese v. Paramount Pictures Corp.*, 952 F. Supp. 550, 557 (E.D. Ill. 1996) (Category I case); *Conseco Group Risk Management Co. v. Ahrens Fin. Sys., Inc.*, No. 00 C 5467, 2001 WL 219627, at *9 (N.D. Ill. Mar. 6, 2001) (Category VI case); *Silk*, 1996 WL 312074, at *35; *Pope*, 95 F.3d at 607, 614; *Harding v. Rosewell*, 22 F. Supp. 2d 806, 818 (N.D.

New Hampshire,³³² New Mexico,³³³ New York,³³⁴ Oklahoma,³³⁵
Oregon,³³⁶ South Carolina,³³⁷ South Dakota,³³⁸ Tennessee,³³⁹

Ill. 1998) (Category VIII case); *Kisser v. Coalition for Religious Freedom*, No. 92 C 4508, 1995 WL 3996, at *7 (N.D. Ill., Jan. 5, 1995) (Category IV case).

³²³ *Hancock*, 933 F. Supp. at 1475; *Lundell Mfg. Co.*, 98 F.3d at 355, *Mercer*, 129 F. Supp. at 1237.

³²⁴ *Bryan v. Eichenwald*, No. CIV.A. 99-2543-CM, 2001 WL 789401 (D. Kan. June 8, 2001) (Category VI case); *Warren v. City of Junction City*, 207 F. Supp. 2d 1216, 1220 (D. Kan. 2002) (Category III case).

³²⁵ *Veilleux*, 206 F.3d at 108.

³²⁶ *Sassone v. Elder*, 601 So. 2d 792, 799 (La. Ct. App. 1992) (Category I case).

³²⁷ *Peroutka v. Strong*, 695 A.2d 1287, 1297-98 (Md. Ct. App. 1997) (Category VI case); *Samuels v. Tschechtelin*, 763 A.2d 209, 242-43 (Md. Ct. App. 2000) (Category VI case); *Biospherics*, 171 F.2d at 184; *Agora, Inc. v. Axxess, Inc.*, 90 F. Supp. 2d 697, 701 (D. Md. 2000) (Category VII case); *Freyd v. Whitfield*, 972 F. Supp. 940, 946 (D. Md. 1997) (Category VI case).

³²⁸ *Locricchio v. Evening News Ass'n*, 476 N.W.2d 112, 131 n.34 (Mich. 1991) (Category I case); *Ireland v. Edwards*, 584 N.W.2d 632, 636 (Mich. Ct. App. 1998) (Category VI case); *Parks v. Laface Records*, 76 F. Supp. 2d 775, 785 (E.D. Mich. 1999) (Category VIII case).

³²⁹ *Northland Merchandisers, Inc. v. Menard*, No. C5-96-2177, 1997 WL 408051 (Minn. Ct. App. July 22, 1997) (Category VI case); *Johnson*, 10 F. Supp. 2d at 1078.

³³⁰ *Benner v. Johnson Controls, Inc.*, 813 S.W.2d 16, 20 (Mo. Ct. App. 1991) (Category VI case); *Rockwood Bank v. Goia*, 170 F.3d 833, 842 (8th Cir. 1999) (Category VI case).

³³¹ *Wellman*, 825 P.2d at 211; *Riggs*, 19 F. Supp. 2d at 1184.

³³² *Gray v. St. Martin's Press, Inc.*, 221 F.3d 243, 248 (1st Cir. 2000) (Category II case); *Douglas*, 2000 WL 1513712, at *3.

³³³ *Andrews*, 892 P.2d at 619.

³³⁴ *Coliniatis*, 848 F. Supp. at 468; *Abbott*, 1998 WL 849412, at *7; *Belly Basics, Inc.*, 95 F. Supp. 2d at 146.

³³⁵ *Metcalf v. KFOR-TV, Inc.*, 828 F. Supp. 1515, 1529-33 (W.D. Okla. 1992) (Category I case).

³³⁶ *Fender v. City of Oregon City*, Nos. 93-35060, 93-35100, 1994 WL 534550, at *5 (9th Cir. Oct. 3, 1994).

³³⁷ *Introini v. Richland County*, Civ. A. No. 3:89-30680OBC, 1993 WL 735790 (D.S.C. Dec. 28, 1993) (Category III case); *Woodward v. Weiss*, 932 F. Supp. 723, 726 (D.S.C. 1996) (Category IV case).

³³⁸ *Paint Brush Corp.*, 599 N.W.2d at 395-96 (the court making the overstatement that "[m]any of the United States Courts of Appeals have changed their examination of 'opinion' from the 'four factor test' to one of determining if the opinion contains an objectively verifiable assertion").

³³⁹ *Zius v. Shelton*, No. E1999-01157-COA-R9-CV, 2000 WL 739466, at *3 (Tenn. Ct. App. June 6, 2000) (Category II case).

Texas,³⁴⁰ Utah,³⁴¹ Virginia,³⁴² Washington,³⁴³ West Virginia,³⁴⁴ Wisconsin,³⁴⁵ and Wyoming³⁴⁶ have utilized the *Milkovich* verifiability (or provability) factor. The Eighth Circuit in a case emanating from Missouri cited *Janklow*³⁴⁷ and *Milkovich* as authority for the verifiability factor.³⁴⁸

Courts which Refer to the de Novo Directive

Only a few courts have referred to *Milkovich*'s admonition that when the First Amendment is involved courts of review must review the record *de novo*.³⁴⁹

Is Opinion an Affirmative Defense or an Element of Defamation?

The Supreme Court in *Milkovich* did not say whether "opinion" was an element of the tort of defamation or an exception to a cause of action for defamation, raised usually by an affirmative defense. If the element of "opinion" forms part of the tort, lack of "opinion" would have to be included in the definition.

³⁴⁰ *Liles v. Finstad*, No. 01-94-00258-CV, 1995 WL 457260, at *7 (Tex. Ct. App. Aug. 3, 1995) (Category I case); *Caballero v. Bridgforth*, No. 05-96-01927-CV, 1999 WL 262060 *4 (Tex. Ct. App. May 4, 1999) (Category VI case); *Am. Broad. Cos. v. Gill*, 6 S.W.3d 19, 29 (Tex. Ct. App. 1999) (Category I case); *Gaylord Broad. Co.*, 7 S.W.3d 279, 284 (Tex. Ct. App. 1999) (Category II case); *Granada Biosciences, Inc. v. Forbes, Inc.*, 49 S.W.3d 610, 619 (Tex. Ct. App. 2001) (Category I case); *Burch v. Coca Cola Co.*, 119 F.3d 305, 325 (5th Cir. 1997) (Category VIII case).

³⁴¹ *Computerized Thermal Imaging*, 2001 WL 670927, at *2.

³⁴² *Steinla v. Jackson*, LAW No. 96-285, 1997 WL 1070597, at *3 (Va. Cir. Ct. May 20, 1997) (Category I case); *Chapin*, 993 F.2d at 1091-92.

³⁴³ *Haueter*, 811 P.2d at 238; *Schmalenberg v. Tacoma News, Inc.*, 943 P.2d 350, 357 n.27 (Wash. Ct. App. 1997) (Category I case).

³⁴⁴ *Maynard*, 447 S.E.2d at 296, 299, *Hupp*, 490 S.E.2d at 886-88.

³⁴⁵ *Milsap v. Journal/Sentinel, Inc.*, 100 F.3d 1265, 1268 (7th Cir. 1996) (Category I case); *Criticare Sys., Inc. v. Nellcor, Inc.*, 856 F. Supp. 495, 506-07 (E.D. Wis. 1999) (Category VIII case).

³⁴⁶ *Spence*, 816 P.2d at 776.

³⁴⁷ 788 F.2d 1300.

³⁴⁸ *Beverly Hills Foodland*, 39 F.3d at 196.

³⁴⁹ See *Kolegas*, 607 N.E.2d at 303; *Wells v. Liddy*, 186 F.3d 505, 520 (4th Cir. 1999) (Category IV case); *Hinerman*, 423 S.E.2d at 587.

The *Restatement of Torts*, though not completely answering that issue, by not including “opinion” in its definition, seems to take the position that it is an exception, raised by an affirmative defense:

To create liability for defamation there must be:

- (a) a false and defamatory³⁵⁰ statement concerning another
- (b) an unprivileged publication to a third party
- (c) fault amounting at least to negligence on the part of the publisher, and
- (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.³⁵¹

There are two schools of thought among the courts. In 1992, the Eleventh Circuit, in a case emanating from Florida, taking the position that the *Milkovich* doctrine about “opinions” is an affirmative defense, would not consider it until defamation had been proved.³⁵² A Court of Appeals of Indiana, apparently believing that “opinion” is an affirmative defense, which can be asserted only after defamation is established, held that *Milkovich* did not apply where the plaintiff has not established defamation because the subject statement was true.³⁵³ A later decision of an Indiana Court of Appeals conformed to that ruling, by holding that a motion to dismiss based on an “opinion” defense would not be considered, since the Supreme Court in *Milkovich* did away with it as a “separate constitutional privilege.”³⁵⁴ A U.S. District Court Judge in California ruled that before *Milkovich* could be applied, a complaint must first state a cause of action under California law.³⁵⁵

³⁵⁰ See *supra* note 94 for the *Restatement* definition of “defamatory.”

³⁵¹ RESTATEMENT (SECOND) OF TORTS § 558 (1977).

³⁵² See *Jones v. Am. Broad. Cos.*, 961 F.2d 1546, 1547 (11th Cir. 1992) (Category I case). This decision was rendered upon remand from the U.S. Supreme Court’s vacation of an earlier decision in favor of the defendant. See *Jones v. Am. Broad. Cos.*, 498 U.S. 892 (1990).

³⁵³ See *Heeb v. Smith*, 613 N.E.2d 416, 422 (Ind. Ct. App. 1993) (Category III case).

³⁵⁴ See *McQueen v. Fayette County Sch. Corp.*, 711 N.E.2d 62, 66-67 (Ind. Ct. App. 1999) (Category VI case).

³⁵⁵ *Mattel, Inc. v. MCA Records*, 28 F. Supp. 2d 1120, 1161 (C.D. 1998) (Category VI case).

A Connecticut Superior Court denied a motion to strike an "opinion defense."³⁵⁶ Recently an Illinois Appellate Court found that "opinion" was an affirmative defense, which under *Milkovich* may not be asserted in defamation cases.³⁵⁷ The Fourth Circuit, in a case emanating from South Carolina, refused to recognize *Milkovich* where the plaintiff had not proved defamation, indicating that it considers "opinion" an affirmative defense rather than an element of the cause of action.³⁵⁸

Courts in New Jersey are apparently the only ones taking the position that "opinion" is an element of defamation, rather than an affirmative defense based upon that tort. In 1994, the New Jersey Supreme Court opined that the "content," "verifiability," and "context" factors were not affirmative defenses, but elements of a cause of action in defamation.³⁵⁹ In 1999, the U.S. Second Circuit Court of Appeals, in a case applying New Jersey law, recognized three factors, "(1) content; (2) verifiability; and (3) context", as "inform[ing] the assessment of potential defamatory meaning," rather than as a means to resolve the opinion/fact inquiry.³⁶⁰ While it mentioned *Milkovich* in its discussion, it concluded that "[w]eighing all three factors separately, and then together," the law of New Jersey would hold the subject statement non-defamatory.³⁶¹

Many courts have not made proclamations on the issue. They utilize a variety of procedural mechanisms for resolving their cases. Courts in the following states have dismissed complaints:

³⁵⁶ See *Rearick v. Refkovsky*, No. CV95 043978 S., 1995 WL 681474, at *2 (Conn. Super. Ct. Nov. 9, 1995) (Category IV case).

³⁵⁷ See *Stavros v. Marrese*, 753 N.E.2d 1013, 1018 (Ill. App. Ct. 2001) (Category III case). Actually, the court used the Illinois Supreme Court's decision in *Bryson v. News Am. Publ'g, Inc.*, 672 N.E.2d 1207 (Ill. 1996) as authority, which, it said, quoted *Milkovich*.

³⁵⁸ See *Carr v. Forbes, Inc.*, 259 F.3d 273, 282 n.3 (4th Cir. 2001) (Category I case). To the same effect was the ruling of a U.S. District Judge in Florida. See *Carlson v. WPLG/TV-10*, 956 F. Supp. 994, 1006 n.10 (S.D. Fla. 1996) (Category VIII case).

³⁵⁹ See *Ward*, 643 A.2d at 978.

³⁶⁰ See *Lee v. Bankers Trust Co.*, 166 F.3d 540, 546 (2d Cir. 1999) (Category VI case) (applying New Jersey law).

³⁶¹ *Id.* at 547.

California,³⁶² Colorado,³⁶³ Hawaii,³⁶⁴ Illinois,³⁶⁵ Kansas,³⁶⁶ Maryland,³⁶⁷ Massachusetts,³⁶⁸ Missouri,³⁶⁹ Nebraska,³⁷⁰ New Hampshire,³⁷¹ New Mexico,³⁷² New York,³⁷³ Ohio,³⁷⁴ Utah³⁷⁵ Virginia³⁷⁶ and Wisconsin.³⁷⁷ O.J. Simpson's lawyer, Johnnie Cochran, sued a *New York Post* columnist for writing that Cochran would "say or do about anything to win, typically at the expense of the truth"³⁷⁸ A District Judge for the Central District of California granted, with prejudice, a Rule 12(b)(6) motion.³⁷⁹ In finding the statement "non-actionable opinion," the court examined it in its broad context, its specific context and its susceptibility of being proved true or false, and concluded that "no one can mistake [the] column for anything more than an elucidation of [the columnist's] opinion that Cochran, in view of the defensive strategy in the Simpson case."³⁸⁰ Federal law was recognized as setting the standard for dismissal, but since the issue under a Rule 12(b)(6) motion is whether the complaint states a cause of action, "the

³⁶² See *Nicosia*, 72 F. Supp. 2d at 1111; *Ferlauto*, 88 Cal. Rptr. 2d at 852; *Metabolife*, 264 F.3d at 850; *Moyer*, 275 Cal. Rptr. at 498; *Snider*, 1992 WL 182186, at *5; *Morningstar*, 29 Cal. Rptr. 2d at 559; *Cochran*, 210 F.3d at 1038.

³⁶³ See *Jefferson County*, 175 F.3d at 860.

³⁶⁴ *Fasi*, 1997 WL 285939, at *1.

³⁶⁵ *Gist*, 671 N.E.2d at 1157; *Hopewell*, 701 N.E.2d at 105; *Aroonsakul*, 664 N.E.2d at 1100; and *Gosling*, 1996 WL 199738, at *9.

³⁶⁶ *Hayhurst*, 1996 WL 346595, at *2.

³⁶⁷ *Agora*, 90 F. Supp. 2d at 706; *Biospherics*, 171 F.3d at 186.

³⁶⁸ *Phantom Touring*, 953 F.2d at 731; *Furst*, 1995 WL 324729, at *3.

³⁶⁹ *Klein*, 903 F. Supp. at 1338.

³⁷⁰ *Wheeler*, 508 N.W.2d at 923.

³⁷¹ *Godfrey*, 794 F. Supp. at 1193.

³⁷² See *Andrews*, 892 P.2d at 627.

³⁷³ *Weinstein*, 1996 WL 137313, at *1; *Levin*, 119 F.3d at 197; *Don King*, 742 F. Supp. at 786; *McGill*, 582 N.Y.S.2d at 99; *Protic*, 46 F. Supp. 2d at 282; *Rappaport*, 618 N.Y.S.2d at 752.

³⁷⁴ *Vail*, 649 N.E.2d at 186.

³⁷⁵ *West*, 872 P.2d at 1021.

³⁷⁶ *Steinla*, 1997 WL 1070597, at *8; *Chapin*, 993 F.2d at 1099.

³⁷⁷ *Dilworth*, 75 F.3d at 308.

³⁷⁸ See *Cochran v. NYP Holdings, Inc.*, 58 F. Supp. 2d 1113 (C.D. Cal. 1998). The article was a polemic on why Cochran should not come to New York City to participate in a trial that had high racial overtones.

³⁷⁹ See *id.* at 1126.

³⁸⁰ *Id.* at 1116.

standard for dismissal in state court is highly relevant.”³⁸¹ The Ninth Circuit affirmed, primarily on the basis of the District Court’s rationale, which the appellate court adopted.³⁸²

The Supreme Court of Oklahoma issued a Writ of Prohibition to arrest the continuation of a defamation action which, in the court’s view, should have been dismissed at the pleading stage.³⁸³ Courts, in Delaware,³⁸⁴ Florida,³⁸⁵ Illinois,³⁸⁶ Kansas,³⁸⁷ Missouri,³⁸⁸ Nevada,³⁸⁹ New York,³⁹⁰ Ohio,³⁹¹ Pennsylvania,³⁹² Tennessee,³⁹³ and the Virgin Islands,³⁹⁴ have found it inappropriate to grant motions to dismiss in defamation cases. At least one defamation case was dismissed on immunity grounds.³⁹⁵ A few courts have entered judgments on the pleadings.³⁹⁶ Some courts have opined that in defamation cases summary judgments are of particular value.³⁹⁷ Far more courts grant summary judgments for

³⁸¹ *Id.* at 1120 n.4.

³⁸² See *Cochran v. NYP Holdings, Inc.*, 210 F.3d 1036, 1038 (9th Cir. 2000).

³⁸³ See *Gaylord*, 958 P.2d at 150.

³⁸⁴ See *Ramunno*, 705 A.2d at 1040.

³⁸⁵ See *Florida Med. Ctr.*, 568 So. 2d at 460.

³⁸⁶ See *Scheidler*, 751 F. Supp. at 746; *Kolegas*, 607 N.E.2d at 213; *Kumaran*, 617 N.E.2d at 203; *Wilkow*, 241 F.3d at 555 (holding that the motion to dismiss should be treated as a motion for summary judgment).

³⁸⁷ *Classic Communications, Inc. v. Rural Tel. Serv. Co.*, 956 F. Supp. 910, 920 (D. Kan. 1997) (Category VIII case).

³⁸⁸ *Nazeri*, 860 S.W.2d at 306, 317.

³⁸⁹ *Riggs*, 19 F. Supp. 2d at 1179, 1185.

³⁹⁰ *Church of Scientology*, 778 F. Supp. at 668; *Coliniatis*, 848 F. Supp. at 471; *Flamm*, 201 F.3d at 155; *Gross*, 603 N.Y.S.2d at 818.

³⁹¹ *U.S. Med. Corp.*, 753 F. Supp. at 681.

³⁹² *Petula*, 588 A.2d at 109.

³⁹³ *Zius*, 2000 WL 739466, at *4.

³⁹⁴ *Callender*, 1995 WL 409028, at *6.

³⁹⁵ *Feldman v. Bahn*, 12 F.3d 730, 734 (7th Cir. 1994) (Category VI case).

³⁹⁶ See *Harris Publ'ns, Inc.*, 1998 WL 849412, at *10, in which judgment on the pleadings was entered in favor of the plaintiff. See *Kahn*, 284 Cal. Rptr. at 254, and *Douglas*, 2000 WL 1513712, at *7, in which judgment on the pleadings was entered for the defendant.

³⁹⁷ See *Jackson*, 80 Cal. Rptr. 2d at 15, in which the court said: “because unnecessary protracted litigation would have a chilling effect upon the exercise of First Amendment rights, speedy resolution of cases involving free speech is desirable. . . . Therefore, summary judgment is a favored remedy”; see also *Woodcock*, 646 A.2d at 108 (concurring opinion) (“The perpetuation of meritless actions, with their attendant costs, chills the exercise of press freedom.

the defendant, rather than dismissing the Complaints: Alabama,³⁹⁸ Arizona,³⁹⁹ California,⁴⁰⁰ Colorado,⁴⁰¹ Connecticut,⁴⁰² District of Columbia,⁴⁰³ Florida,⁴⁰⁴ Hawaii,⁴⁰⁵ Illinois,⁴⁰⁶ Maryland,⁴⁰⁷ Massachusetts,⁴⁰⁸ Michigan,⁴⁰⁹ Minnesota,⁴¹⁰ Missouri,⁴¹¹

To avoid this, trial courts should not hesitate to use summary judgment procedures where appropriate to bring such actions to speedy end.”) *But Cf. Sassone*, 601 So. 2d at 799 (“Only in the clearest cases may courts, applying the *Milkovich* principles, determine as a matter of law that the assertions before them state or imply actual facts and are therefore entitled to no constitutional protection.”); *see also Carlson*, 956 F. Supp. at 1005 (opining that “[s]ummary judgment is an appropriate vehicle for disposition of a defamation claim.”); *Dragisich*, 1993 WL 19665, at *1; *Immuno*, 567 N.E.2d at 1282 (decrying the “chilling effect of protracted litigation”). It has been opined, however, that “the elimination of the so-called opinion privilege means more defamation cases should go to the jury and fewer media defendants should receive summary judgment in most jurisdictions.” *See James F. Ponsoldt, Challenging Defamatory Opinions as an Alternative to Media Self-Regulation*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 45, 45 (1998).

³⁹⁸ *Deutsch*, 603 So. 2d at 912; *Sanders*, 776 So. 2d at 75, and *Marshall*, 13 F.3d at 1258.

³⁹⁹ *Lexecon, Inc.*, 884 F. Supp. at 1397.

⁴⁰⁰ *Gill*, 278 Cal. Rptr. at 313; *Kimura*, 281 Cal. Rptr. at 701; *James*, 20 Cal. Rptr. 2d at 901; *Underwager*, 69 F.3d at 368; *Dodds*, 145 F.3d at 1069; *Mattel*, 28 F. Supp. 2d at 1164; *Jackson*, 80 Cal. Rptr. 2d at 15-16; *Winter*, 2000 WL 1225798, at *1; *Isuzu*, 66 F. Supp. 2d at 1129.

⁴⁰¹ *Hannon*, 1991 WL 23787, at *4; *Gehl*, 838 F. Supp. at 1420; *Seidle*, 30 F. Supp. 2d at 1319.

⁴⁰² *Lizotte*, 709 A.2d at 61.

⁴⁰³ *Moldea*, 22 F.3d at 320; *Washington*, 80 F.3d at 555; *Foretich*, 753 F. Supp. at 959; *Coles*, 881 F. Supp. at 32; *Lane*, 985 F. Supp. at 153; *Guilford*, 760 A.2d at 602; *Novecon*, 977 F. Supp. at 46; *Q Int'l*, 1999 WL 1027034, at *8; *Ellis*, 1997 WL 863267, at *1.

⁴⁰⁴ *Pullam*, 647 So. 2d at 254.

⁴⁰⁵ *Gold*, 962 P.2d at 362; *Partington*, 56 F.3d at 1151.

⁴⁰⁶ *Piersall*, 595 N.E.2d at 108; *Russell v. Am. Broad. Cos.*, No. 94 C 5768, 1997 WL 598115, at *8 (N.D. Ill. Sept. 19, 1997) (Category I case); *Haynes*, 8 F.3d at 1235; *Boese*, 952 F. Supp. at 560; *Pope*, 95 F.3d at 617.

⁴⁰⁷ *Lapkoff*, 969 F.2d at 80; *Henry*, 836 F. Supp. at 1206; *Perutka*, 695 A.2d at 1300; *Freyd*, 972 F. Supp. at 945.

⁴⁰⁸ *Lyons*, 612 N.E.2d at 1165; *Dulgarian*, 652 N.E.2d at 607; *Brown*, 862 F. Supp. at 631.

⁴⁰⁹ *Ireland*, 584 N.W.2d at 634; *Kevorkian*, 602 N.W.2d at 238; *Johnson*, 1998 WL 1083502, at *3.

⁴¹⁰ *Hunt*, 465 N.W.2d at 92; *Lund*, 467 N.W.2d at 370; *Conroy*, 789 F. Supp. at 1463; *Dragisich*, 1993 WL 19665, at *3; *Geraci*, 526 N.W.2d at 401; *Hunter*,

Nevada,⁴¹² New Hampshire,⁴¹³ New Jersey,⁴¹⁴ New Mexico,⁴¹⁵ New York,⁴¹⁶ Ohio,⁴¹⁷ Oklahoma,⁴¹⁸ Pennsylvania,⁴¹⁹ Rhode Island,⁴²⁰ South Carolina,⁴²¹ South Dakota,⁴²² Tennessee,⁴²³ Texas,⁴²⁴ Virginia,⁴²⁵ Washington,⁴²⁶ Wisconsin,⁴²⁷ and Wyoming.⁴²⁸ Summary judgments for the defendant have been overturned by the appellate courts⁴²⁹ and some trial judges have refused to render summary relief because of the presence of factual issues.⁴³⁰ Motions for Directed Verdict have been granted

545 N.W.2d at 710; *Northland*, 1997 WL 408051, at *4; *Johnson*, 10 F. Supp. 2d at 1077; *McClure*, 223 F.3d at 857; *Toney*, 85 F.3d at 401.

⁴¹¹ *Beverly Hills*, 39 F.3d at 191; *Shepard*, 115 F. Supp. 2d at 1148.

⁴¹² *Wellman*, 825 P.2d at 212.

⁴¹³ *Faigin*, 184 F.3d at 88; *Gray*, 221 F.3d at 253.

⁴¹⁴ *Lynch*, 735 A.2d at 1142.

⁴¹⁵ *Moore*, 881 P.2d at 745; *Schwartz*, 215 F.3d at 1147.

⁴¹⁶ *Immuno*, 567 N.E.2d at 1282; *McNally*, 764 F. Supp. at 853; *J & J Sheet Metal v. Picarazzi*, 793 F. Supp. 1104, 1105 (N.D.N.Y. 1992) (Category IV case); *Corporate Training*, 981 F. Supp. at 115; *600 West 115th Street Corp.*, 603 N.E. at 938.

⁴¹⁷ *Wampler*, 752 N.E.2d at 967.

⁴¹⁸ *Metcalfe*, 828 F. Supp. at 1540.

⁴¹⁹ *Tucker v. Fischbein*, No. CIV. A. 97-4717, 1999 WL 58585, at *2 (E.D. Pa. Jan. 29, 1999) (Category V case).

⁴²⁰ *Beattie*, 746 A.2d at 719.

⁴²¹ *Introini*, 1993 WL 735790, at *1; *Faltas*, 928 F. Supp. at 654; *Woodward*, 932 F. Supp. at 728.

⁴²² *Janklow*, 459 N.W.2d at 417. *Janklow* is a progeny by virtue of a dissenting judge mentioning the *Milkovich* decision. See *id.* at 428.

⁴²³ *Stilts*, 950 F. Supp. at 221.

⁴²⁴ *Gill*, 6 S.W.3d at 47; *J.H. Hubbard*, 2000 WL 1125554, at *1.

⁴²⁵ *Lapkoff*, 959 F.2d at 78.

⁴²⁶ *Schmalenberg*, 943 P.2d at 352; *Haueter*, 811 P.2d at 241.

⁴²⁷ *Kaminske*, 102 F. Supp. 2d at 1083.

⁴²⁸ *Dworkin*, 839 P.2d at 920.

⁴²⁹ See *Hall*, 285 Cal. Rptr. at 823; *Songer*, 1999 WL 603796, at *1; *White*, 909 F.2d at 514, 529; *Sassone*, 602 So. 2d at 800; *Samuels*, 763 A.2d at 252; *Benner*, 813 S.W.2d at 21; *Hale*, 986 P.2d at 418, 423-24; *Paint Brush Corp.*, 599 N.W.2d at 400; *Moman*, 1997 WL 167210, at *14; *Flowers*, 910 F.2d at 213; *Lundell Mfg. Co.*, 98 F.3d at 366; *Spence*, 816 P.2d at 779.

⁴³⁰ See *Stokes*, 25 F. Supp. 2d at 1008; *Sucich*, 1996 WL 453077, at *3; *Gaylord Entertainment*, 958 P.2d at 135, 151; *Foretich*, 753 F. Supp. at 969-71; *Fanelle v. Lojack Corp.*, No. CIV. A. 99-4292, 2000 WL 1801270, at *1, 14 (E.D. Pa. Dec. 7, 2000) (Category IV case); *Harding*, 22 F. Supp. 2d at 820.

infrequently.⁴³¹ Only about 15 % of the cases got to a jury; which, in each case, resulted in a plaintiff's verdict.⁴³² Almost half of those were reversed.⁴³³

Conclusion

In his article championing a proposed Uniform Defamation Act, drafted under the auspices of the National Conference of Commissioners on Uniform State Laws, Professor Robert M. Ackerman has said that "[t]hirty years ago, the United States Supreme Court, with the best of intentions, set defamation on a new course."⁴³⁴ Unfortunately, the path taken by the court has protected neither speech nor reputation in the desired manner.⁴³⁵ Though a bit overstated, Ackerman's opinion (to coin a phrase), reflects the thinking of what I suspect is a rather substantial element of academia, if not the legal profession in general. *Milkovich v. Lorain Journal Co.*,⁴³⁶ concerned the action of a private person against the media for its account of his participation

⁴³¹ See *Swengler*, 993 F.2d at 1072 (directed verdict for plaintiff); *Dodson*, 812 S.W.2d at 98 (directed verdict for defendant); *Holtzscheiter*, 506 S.E.2d at 515 (directed verdict for defendant). *Yetman*, 811 P.2d at 334 (sending the case to the jury rather than granting a summary judgment filed by both parties).

⁴³² See *Gilbrook*, 177 F.3d at 878; *Woodcock*, 646 A.2d at 102; *Levinsky's, Inc.*, 127 F.3d at 136; *Veilleux*, 206 F.3d at 135; *Reuber*, 925 F.2d at 720; *Locricchio*, 476 N.W.2d at 142; *Weissman*, 469 N.W.2d at 473; *Roussel*, 688 So. 2d at 716; *Overcast*, 11 S.W.3d at 64; *Ward*, 643 A.2d at 527; *Bross*, 608 N.E.2d at 250; *Shearson*, 806 S.W.2d at 918; *Caballero*, 1999 WL 262060, at *2; *S & T Aircraft*, 2000 WL 13104, at *1; *Hinerman*, 423 S.E.2d at 583; *Maynard*, 447 S.E.2d at 299; *Hupp*, 490 S.E.2d at 884; *Rockwood Bank v. Gaia*, 170 F.3d 833, 836 (8th Cir. 1999) (Category VI case).

⁴³³ See *Gilbrook*, 177 F.3d at 878; *Woodcock*, 646 A.2d at 102; *Reuber*, 925 F.2d at 720; *Ward*, 643 A.2d at 542; *Bross*, 608 N.E.2d at 1183; *Hupp*, 490 S.E.2d at 89.

⁴³⁴ He was referring to *New York Times v. Sullivan*, 376 U.S. 254.

⁴³⁵ Robert M. Ackerman, *Bringing Coherence to Defamation Law Through Uniform Legislation: The Search For An Elegant Solution*, 72 N.C. L. REV. 291, 349 (1994). His only reference to *Milkovich* was that "the Court refused to find a separate constitutional privilege for opinion beyond that already provided through existing privileges" See *id.* at 298 n.40; see also Justice Rehnquist's reference to *Iago*. *Id.* at 331 n. 226.

⁴³⁶ 497 U.S. 1 (1990).

in a matter of public concern.⁴³⁷ The case has been mentioned in the resolution of at least seven other types of cases.⁴³⁸ In not one state case of the same nature as *Milkovich* has a state court used the tripartite *Milkovich* test for its decision,⁴³⁹ and only two federal courts have done so.⁴⁴⁰ The Supreme Court of Wyoming,⁴⁴¹ and a trial court in California,⁴⁴² have used all three *Milkovich* factors, but in different types of cases than that of *Milkovich*. District Courts in Illinois, Maryland, Nevada and Virginia,⁴⁴³ have used the three *Milkovich* factors, but also in non-*Milkovich* (Category I) type cases. The balance of the progeny considered in this paper have treated *Milkovich* in a variety of ways. At least two of them have ignored it;⁴⁴⁴ in some it is referred to only in a dissenting opinion.⁴⁴⁵ Several courts, though mentioning *Milkovich* chose not to apply it.⁴⁴⁶ A large segment of cases refuse to follow *Milkovich* on state grounds.⁴⁴⁷ Some courts find other authority more compelling than the Supreme Court's decision in *Milkovich*.⁴⁴⁸ Some courts construct their own grounds.⁴⁴⁹ Some courts used the "hyperbole" factor;⁴⁵⁰ others used the "context" factor;⁴⁵¹ and others use the "verifiability" factor.⁴⁵² We really haven't progressed from the inquisitorial comment of a California appellate court in July of 1991 that "[t]he precise impact of the

⁴³⁷ What I have designated as a Category I type of case. See *supra* note 98.

⁴³⁸ See *supra* note 98.

⁴³⁹ See *supra* text accompanying notes 253-54.

⁴⁴⁰ *Klein*, 903 F. Supp. at 1332-34; *Faltas*, 928 F. Supp. at 646-49.

⁴⁴¹ *Dworkin*, 839 P.2d at 914-16.

⁴⁴² *Barrett*, 2001 WL 881259, at *6.

⁴⁴³ *Hopewell*, 701 N.E.2d at 103; *Lapkoff*, 969 F.2d at 81; *Flowers*, 112 F. Supp. at 1211; and *Dworkin*, 839 P.2d at 914-16.

⁴⁴⁴ *Newton*, 930 F.2d at 662.

⁴⁴⁵ *Gannett Co.*, 750 A.2d at 1192 n.17, 1193 n.19, 1194; *Falk & Mayfield, L.L.P.*, 974 S.W.2d at 831; *Scott*, 910 F.2d at 215; *Jenkins*, 868 P.2d at 1381; *Bauer*, 530 N.W.2d at 9-10.

⁴⁴⁶ See *supra* notes 105-10.

⁴⁴⁷ See *supra* notes 111-58.

⁴⁴⁸ See *supra* notes 159-205.

⁴⁴⁹ See *supra* notes 206-43.

⁴⁵⁰ See *supra* notes 255-82.

⁴⁵¹ See *supra* notes 283-310.

⁴⁵² See *supra* notes 311-49.

Milkovich decision on the viability of prior law distinguishing between fact and opinion remains to be seen.”⁴⁵³

Shame on the courts for treating a Supreme Court decision in such a desultory manner.⁴⁵⁴ That observation only begs the question - WHY? Rather than attempt an explanation, I think I will just end my seventeen month quest at this point, and besides, I just don't know.⁴⁵⁵

⁴⁵³ *Weller*, 283 Cal. Rptr. at 649.

⁴⁵⁴ I am compelled to point out that at least one scholar does not share my pessimism about the effect of *Milkovich*. Professor Ponsoldt writes: “both *Milkovich* and its progeny remain tools for curbing more outrageous examples of media excess - as long as there are plaintiffs angry enough to assume the risk and expense that a defamation case entails.” See James F. Ponsoldt, *Changing Defamatory Opinions as an Alternative to Media Self-Regulation*, 9 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 45, 65 (1998).

⁴⁵⁵ Actually I have some “opinions” as to why this Supreme Court decision is not being followed as it should be, but if the Shapo article is correct, few will ever read them. He writes: “[t]he traditional law review article seeks to embrace a substantial subject with exhaustive scholarship. Although many articles are much-cited, we suspect that many much-cited articles are not much read. Often their level of detail and refinement is too great for even specialized readers.” See Marshall S. Shapo, *Fact/Opinion = Evidence/Argument*, 91 NW. U. L. REV. 1108, 1108 (1997). Incidentally Professor Shapo's only reference to *Milkovich* in his article is Chief Justice Rehnquist's often quoted shibboleth, “in my opinion Jones is a liar.” See *id.* at 1111, n.16.